(13)

No. 93-768-CFX
Status: GRANTED

Title: Milwaukee Brewery Workers' Pension Plan, Petitioner
v.
Jos. Schlitz Brewing Company and Stroh Brewery Company

Docketed:
November 12, 1993

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Bruton,Michael G.

Counsel for respondent: Greer,James W., Peterson,Donald R., Willard,Richard K.

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Entry	Date	Note	Proceedings and Orders
1	Nov 12 1993	G	Petition for writ of certiorari filed.
2	Nov 12 1993		Appendix of petitioner filed.
4	Nov 30 1993		Order extending time to file response to petition until December 23, 1993.
5	Dec 22 1993		Brief amici curiae of Central States, et al. filed.
6	Dec 22 1993		Brief of respondents Jos. Schlitz Brewing Co., et al. in opposition filed.
7	Dec 22 1993		10 copies of a (NP) District Court opinion lodged.
8	Dec 29 1993		DISTRIBUTED. January 14, 1994 (Page 3)
9	Jan 18 1994	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
10	Jun 8 1994		REDISTRIBUTED. June 24, 1994 (Page 1)
11	Jun 9 1994	X	Brief amicus curiae of United States filed.
12	Jun 27 1994		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
13	Aug 11 1994		Brief amicus curiae of National Coordinating Committee for Multiemployer Plans filed.
14	Aug 11 1994		Brief amicus curiae of Central States Southeast and Southwest Areas Pension Fund filed.
15	Aug 11 1994		Joint appendix filed.
16	Aug 11 1994		Brief of petitioner Milwaukee Brewery Workers' Pension Plan filed.
17	Aug 26 1994	D	Motion of Central States, Southeast and Southwest Areas Pension Fund for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Sep 2 1994		Order extending time to file brief of respondent on the merits until September 19, 1994.
21	Sep 16 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
20	Sep 19 1994		Brief of respondents Jos. Schlitz Brewing Company, et al. filed.
22	Sep 26 1994		Motion of Central States, Southeast and Southwest Areas Pension Fund for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
23	Sep 30 1994		CIRCULATED.

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No. 93-768-CFX

Entry	Date	Note	Proceedings and Orders
25	Oct 7 1994		SET FOR ARGUMENT MONDAY, DECEMBER 5, 1994. (1ST CASE).
26	Oct 19 1994	X	Reply brief of petitioner filed.
27	Nov 23 1994		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Wisconsin (4 BOXES)
28	Dec 5 1994		ARGUED.

93-768

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Seventh Circuit erred when, contrary to the District Court in this case and the United States Court of Appeals for the Third Circuit in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), it held that the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), specifically 29 U.S.C. § 1399(c)(1), does not allow a multiemployer plan to include in the amount of a withdrawing employer's liability for unfunded, vested benefits, interest for the year from the date which MPPAA requires the plan to use in calculating the amount of the employer's liability to the date MPPAA instructs the plan to assume, for the purposes of amortizing the payments, that the employer will make its first payment to the plan.

II. Whether the United States Court of Appeals for the Seventh Circuit erred when it held that, an employer which reserved to itself the right to select the method utilized to calculate the liability imposed on an employer withdrawing from a multiemployer, under-funded, defined benefit pension plan, does not have fiduciary responsibilities to the plan, its participants or beneficiaries but rather, as occurred in this case, may unilaterally impose upon the plan the method which is in its own best interest.[1]

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[1] In accordance with Rule 14.1(b) of the United States Supreme Court, all parties to the proceeding in the United States Court of Appeals for the Seventh Circuit appear in the caption of this case. Subsequent to the time it withdrew from the Milwaukee Brewery Workers' Pension Plan, The Stroh Brewery Company acquired Jos. Schlitz Brewing Company and assumed its liability to the Pension Plan. In addition to the Respondents, the Miller Brewing Company and Pabst Brewing Company were participating employers in the Plan. All participants in the Plan are members of United Auto Workers Local No. 9, A.F.L.-C.I.O.

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IN THE

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OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Milwaukee Brewery Workers' Pension Plan (Plan), respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit held that the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), specifically 29 U.S.C. § 1399(c)(1) (1980), does not allow a multiemployer plan to include in the amount of a withdrawing employer's liability for unfunded, vested benefits, interest for the year from the date which MPPAA requires the plan to use in calculating the amount of the employer's liability to the date MPPAA instructs the plan to assume, for the purposes of amortizing the payments, that the employer will make its first payment to the plan. The Seventh Circuit also held that, when an employer reserves to itself the right to select the method utilized to calculate the liability imposed on an employer withdrawing from a multiemployer, under-funded, defined benefit pension plan, the employer has no fiduciary responsibilities to the plan participants and beneficiaries but rather, may unilaterally impose upon the plan the method which the employer deems is in its own best interest.

OPINIONS BELOW

Arbitrator's Decision: Pursuant to 29 U.S.C. § 1401, the parties submitted their dispute relating to the amount of Schlitz' withdrawal liability to arbitration. The Arbitrator issued an Opinion and Award and Final Award. The Arbitrator re-calculated Schlitz' withdrawal liability based upon the presumptive method for calculating liability rather than the direct attribution method used by the Plan. The Arbitrator also excluded interest for the period from the date used to calculate Schlitz' liability to the date MPPAA required the Plan to presume Schlitz would make its first payment. The Arbitrator's decision resulted in a reduction in Schlitz' withdrawal liability from $41,031,406 imposed by the Plan to $23,300,000. A copy of the Arbitra-

tor's Award and Opinion and the Final Award is included in the Appendix as Exhibits E and F.

District Court Opinion: The District Court rendered a series of opinions. On June 6, 1991, the Court issued a Decision and Order affirming the portion of the arbitrator's award which required re-calculation of Schlitz' withdrawal liability under the presumptive method. However, the District Court reversed and vacated that portion of the arbitrator's award which eliminated interest on the amount of Schlitz' withdrawal liability for the period between the calculation date and the presumptive first payment date. The District Court entered Judgment based upon the June 6, 1991 Decision and Opinion. The District Court's opinion is not reported but is included in the Appendix as Exhibit B.

Through Orders on June 3, 1992 and October 20, 1992, the District Court disposed of issues raised in a timely Rule 59(e) Motion filed by the Plan. The District Court ordered Schlitz to pay the Plan an additional $3,221,371 plus post-judgment interest. These orders are not reported but are included as Exhibits C and D in the Appendix.

Court of Appeals: The Seventh Circuit reversed and remanded the case to the District Court with instructions to enter judgment affirming the Arbitrator's award in its entirety. This Opinion is reported at *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993); 16 E.B.C. 2841 and is contained in the Appendix as Exhibit A.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this Petition for *Certiorari* pursuant to 28 U.S.C. § 1254(1). The Seventh Circuit issued its opinion on August 13, 1993. Pursuant to Supreme Court Rules 13, 14 and 29, the Plan has filed a timely Petition for *Certiorari*.

The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered a judgment on June 6, 1991. The District Court finally disposed of a timely Rule 59(e) Motion to Alter or Amend Judgment on October 29, 1992. Although the District Court did not enter a new judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure, the Seventh Circuit correctly concluded that the parties had waived that requirement. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). A timely Notice of Appeal was filed on November 17, 1992. The Seventh Circuit held that it had jurisdiction to consider the appeal.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, 9 U.S.C. §§ 9 and 29 U.S.C. § 1401(b)(3). The Complaint filed in the District Court sought confirmation of the Arbitrator's award. The Counterclaim filed asked that the award be vacated.

STATUTES INVOLVED

The following applicable statutes have been reproduced and are found in the Appendix Exhibit G.

29 U.S.C. § 1002(21)(A)
29 U.S.C. § 1391
29 U.S.C. § 1104
29 U.S.C. § 1400
29 U.S.C. § 1401

STATEMENT OF THE CASE

The Milwaukee Brewery Workers' Pension Plan is a multiemployer, defined benefit pension plan (Stipulated Statement of Facts[2] at ¶ 6). The Plan was established

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[2] The parties submitted a Stipulated Statement of Facts to the Arbitrator. Most of the facts contained in this Statement of the

(continued...)

March 1, 1954 by an agreement dated August 16, 1954 between Brewery Workers' Local Union No. 9 D.A.L.U. (now U.A.W.), A.F.L.-C.I.O. (Local 9) and participating employers (Stipulation ¶ 5, 6). In 1958, there were six employer participants which bargained jointly as members of the Milwaukee Brewers' Association (Association): Schlitz, Blatz Brewing Company, A. Gettelman Brewing Co., Independent Milwaukee Brewery, Miller Brewing Company (Miller) and Pabst Brewing Company (Pabst) (Stipulation ¶¶ 2, 3, 4, 7, 9). From approximately 1959 through January 1, 1981, the Plan had only three major employer contributors, Miller, Pabst and Schlitz (Stipulation ¶ 14; Transcript of Arbitration Proceedings (Transcript); Volume II, 8/12/87 at 313). The Plan was operated and administered by a Joint Committee consisting of members appointed by Local 9 and the participating employers (Stipulation ¶ 19). The Joint Committee did not have the power to amend the Plan (Stipulation ¶ 21). The Plan could be amended by "mutual agreement of the Union and the Employers" (Stipulation ¶ 16).

On January 16, 1981, at a specially called meeting of the Joint Committee, counsel for the Plan discussed the then recently enacted MPPAA (Stipulation ¶ 24). The Joint Committee instructed legal counsel to the Plan to prepare a letter to Local 9, Miller, Pabst and Schlitz notifying them of the effect of the new law, including the new provisions relating to liability imposed on a withdrawing employer (Stipulation ¶ 22). In MPPAA, Congress provided a method for calculating withdrawal liability which would be automatically utilized if no other permissible method had been selected by the Plan, *see* 29 U.S.C. § 1391. Accordingly, the

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[2] (...continued)
Case are taken from the Stipulation as set forth in the Arbitrator's Opinion (Appendix, Exhibit E). The remainder of the facts are from the testimony before the Arbitrator. The District Court made no new or additional findings of fact.

letter from counsel advised Local 9 and the employers that unless the Plan was amended, the presumptive method for calculating withdrawal liability would apply to the Plan (Stipulation ¶ 23).

In May 1979, Miller, Pabst and Schlitz were, for the first time, unable to reach an agreement on a joint proposal to be submitted to Local 9 (Stipulation ¶¶ 24-28). On January 21, 1981, Schlitz notified Miller, Pabst and Local 9 that Schlitz was withdrawing from the Association and that it would negotiate separately with Local 9 (Stipulation ¶ 29). While negotiations continued, Schlitz remained a contributing employer in the Plan. On March 9, 1981, Schlitz gave notice to Local 9 of its desire to amend the collective bargaining agreement and to reopen the Pension Agreement (Stipulation ¶ 33). On May 20, 1981, Miller, Pabst and Schlitz received notice of a meeting scheduled for May 22, 1981 "for the purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan" (Stipulation ¶ 35). Schlitz did not attend the meeting.

Local 9 reached an agreement with Miller and Pabst on a new collective bargaining agreement (Stipulation ¶ 48). The old collective bargaining agreement expired on May 31, 1981. After Schlitz and Local 9 negotiated to impasse, on June 1, 1981, Local 9 members went out on strike at the Schlitz plant (Stipulation ¶ 36, 38). On July 31, 1981, Schlitz announced that it was permanently closing its Milwaukee plant (Stipulation ¶ 38). Charles Mazza, the Schlitz representative on the Joint Committee, continued to attend meetings of the Committee until his resignation on August 14, 1981. Schlitz withdrew from the Plan on the same date (Stipulation ¶ 31).

Local 9, Miller and Pabst did meet as scheduled on May 22, 1981 and again on May 29, 1981 and agreed to two Memoranda of Understanding (Stipulation ¶¶ 44, 46). These Memoranda amended the Plan effective May 22, 1981 to provide that in connection with any employer

withdrawal from the Plan that occurs on or after May 22, 1981, the Plan will calculate withdrawal liability based upon the direct attribution method permitted by Section 4211(c)(4) of MPPAA. 29 U.S.C. § 1391(c)(4). Schlitz did not agree to the May 22, 1981 or May 29, 1981 Memoranda of Understanding (Stipulation ¶ 47). On August 17, 1981, after Schlitz withdrew from the Plan, the Joint Committee instructed the Plan's actuary to calculate Schlitz' withdrawal liability based on the direct attribution method called for by the two Memoranda of Understanding (Stipulation ¶ 51).

MPPAA provides that the amount of unfunded vested benefits used to calculate an employer's liability will be the amount of unfunded vested benefits at the end of the year preceding the employer's withdrawal. 29 U.S.C. § 1391. MPPAA also provides that an employer shall pay its withdrawal liability over the period of years necessary to amortize such amount in level annual payments calculated as if the first payment were made on the first day of the plan year following the plan year in which withdrawal occurs. 29 U.S.C. § 1399(c)(1)(A)(i). Schlitz gave its notice of withdrawal in August, 1981. Pursuant to the provisions of MPPAA, the Plan included within the amount of Schlitz' liability interest for the period from the date Schlitz' liability was calculated, December 31, 1980, to the date on which Schlitz' first payment was presumptively to be made, January 1, 1982.

On September 29, 1981, the Joint Committee sent a letter to Schlitz imposing withdrawal liability in the amount of $41,031,406 (Stipulation ¶ 53). On October 2, 1981, Schlitz wrote to the Plan requesting information on the calculation of its withdrawal liability (Stipulation ¶ 54). The Plan provided information and Schlitz continued to request additional information from the Plan until March 19, 1982 when Schlitz sent a letter to the Plan requesting arbitration (Stipulation ¶¶ 55, 56, 58, 59, 60, 61). On the same day, Schlitz filed suit in the United States District Court for the Eastern District of Wisconsin against several

parties including the Plan and the Pension Benefit Guaranty Corporation (PBGC). On December 28, 1984, the District Court dismissed the Complaint because MPPAA provides that disputes over the calculation of withdrawal liability must first be submitted to arbitration. The parties then proceeded to arbitration.

During the arbitration hearings, Schlitz admitted that the financial condition of the Plan was a matter of significant concern and, in fact, acknowledged that the unfunded vested liability of the Plan in 1981 was a horrendous problem (Transcript Volume I, 8/11/87 at 73). By Schlitz' own acknowledgement, a disagreement over whether to increase benefits was one of the reasons that Schlitz withdrew from the Association. *Id.* In addition there was concern, well known to Schlitz, that the Plan could not meet its minimum funding requirements in 1981 or at least at some time during the term of the new collective bargaining agreement (Transcript Volume II, 8/12/87 at 210; Volume IV, 9/29/87 at 630). In 1981, beer sales were declining, employment in the brewing industry was declining and the hours worked by employees in the breweries were declining (Transcript Volume I, 8/11/87 at 96). Union membership had declined from a high of 8,800 workers to 3,000 workers in 1981 (Transcript Volume II, 8/12/87 at 313). As more and more brewery workers retired and as the brewery industry in Milwaukee shrank, contributions to the Plan were not keeping pace.

Schlitz admitted it considered the best interests of Schlitz, not the Plan or its participants and beneficiaries when it refused to agree to application of the direct attribution method rather than the presumptive method to calculate a withdrawing employer's liability to the Plan. (Transcript Volume I, 8/11/87 at 104). Schlitz attempted to justify its conduct by asserting that Miller and Pabst amended the Plan to provide for the method which was in their own best interest. According to Schlitz, none of the employers was concerned with the best interest of the Plan.

Miller's representative testified that he believed the direct attribution method was appropriate because each employer was allocated the liability associated with its own retirees (Transcript Volume II, 8/12/87 at 271), and because fiduciary concerns about the stability of the Plan had to govern the selection of a method for calculating withdrawal liability (Transcript Volume II, 8/12/87 at 266-268). The Pabst representative testified that it similarly considered its obligations to the beneficiaries of the Plan and approved the Plan amendment selecting the direct attribution method (Transcript Volume III, 8/14/87 at 551-53).

The Plan's registered actuary testified that because the Plan had maintained good records, because there were only three participating employers for a substantial period of time and because there was not much movement of workers between employers, the direct attribution method was particularly appropriate for this Plan (Transcript Volume V, 9/29/87 at 658-59). In 1980, the Plan had approximately $51 million in assets (Transcript Volume V, 9/29/87 at 662). At the time Schlitz withdrew, the Plan's actuary calculated the total vested liability for the Plan as $162 million, leaving an unfunded vested liability of $111 million (Transcript Volume V, 9/27/92 at 728).

The Plan presented Jeffrey N. Clayton, former administrator of the Office of Pension and Welfare Benefits Programs as an expert witness (Transcript Volume VII, 10/1/87 at 870, 872). Mr. Clayton testified that the selection of the method for determining withdrawal liability under MPPAA clearly involves fiduciary responsibilities (Transcript Volume VII, 10/1/87 at 886). Mr. Clayton also testified that the direct attribution method was the only appropriate method for calculating withdrawal liability for this Plan (Transcript Volume VII, 10/1/87 at 887-892, 894). Schlitz presented no evidence that the presumptive method was in the best interest of the Plan, its participants and beneficiaries.

Arbitrator's Award[3]

Relying upon the unanimous consent requirement found in the Association Agreement as well as the dictionary definition of "agreement," the Arbitrator held that Schlitz' consent was necessary to amend the Plan (Appendix Exhibit E at 18-19). Because Schlitz had not agreed to the Plan amendment, the arbitrator concluded that the Plan's calculation of Schlitz' withdrawal liability on the basis of the direct attribution method was clearly erroneous (Appendix Exhibit E at 28). The Arbitrator rejected the Plan's argument that Schlitz' agreement to the amendment was unnecessary because selection of the method for calculating withdrawal liability is a fiduciary function (Appendix Exhibit E at 23-28). The Arbitrator also held that it was clearly erroneous for the Plan to include as part of Schlitz' liability, interest on Schlitz' liability for the year 1981 because MPPAA did not specifically provide for interest relating to that period (Appendix Exhibit E at 38-41). Ultimately, on August 24, 1988, the Arbitrator ruled that Schlitz' withdrawal liability should have been $23,300,000.

District Court's Decision And Orders

On August 29, 1988, Schlitz filed a Complaint in the United States District Court for the Eastern District of Wisconsin seeking confirmation and enforcement of the Arbitrator's award. The Plan filed an Answer and Counterclaim asking the Court to vacate or modify the award. The parties submitted briefs in support of their positions. On June 6, 1991, the District Court decided that the Arbitrator's opinion that unanimous consent was necessary to amend the Plan was not clearly erroneous and therefore,

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[3] Numerous issues were submitted to the Arbitrator. Some of those issues were not pursued in the District Court. Only those portions of the Arbitrator's decision relevant to the issues raised in this Petition for *Certiorari* are discussed.

the Plan's calculation of Schlitz' withdrawal liability based upon the direct attribution method was clearly erroneous (Appendix at Exhibit B). The District Court also rejected the Plan's argument that selecting the method for calculating withdrawal liability is a fiduciary function. The District Court did, however, conclude that the Plan had properly included interest on the amount of Schlitz' withdrawal liability for 1981 and vacated the Arbitrator's award on that issue (Appendix Exhibit B). The District Court entered Judgment on June 6, 1991.

The Plan filed a timely Rule 59(e) Motion to Alter or Amend the Judgment. The Plan asked the Court to quantify the amount in excess of $23,300,000 Schlitz owed to the Plan based upon the 1981 interest which was properly included in Schlitz' liability and to award the Plan prejudgment interest on that amount. In Orders entered on June 3, 1992 and October 20, 1992, the District Court found the amount of Schlitz' additional withdrawal liability to be $2,619,041; awarded the Plan pre-judgment interest at the prime interest rate on the amount through June 6, 1991; and awarded post-judgment interest at the statutory interest rate on that amount after June 6, 1991 (Appendix Exhibits C and D). The Plan filed a timely Notice of Appeal and Schlitz filed a timely Notice of Cross-Appeal.

Seventh Circuit's Opinion

The Seventh Circuit reversed the District Court's decision and remanded the case with instructions to enter judgment affirming the Arbitrator's award in full. The Seventh Circuit held that the party or parties responsible for selecting the method of calculating withdrawal liability had no fiduciary responsibility to select the method in the best interests of the Plan, its participants and beneficiaries. The Seventh Circuit also rejected the holding of the United States Court of Appeals for the Third Circuit in *Huber v. Casablanca Fans*, 916 F.2d 85 (3d Cir. 1990). Instead, the

Court adopted the analysis of the Fourth Circuit in *Borden, Inc. v. Bakery Confectionery Union & Industry Pension*, 974 F.2d 528 (4th Cir. 1992), by holding that MPPAA does not allow the Plan to include interest on the amount of Schlitz' withdrawal liability for the period from the date liability is fixed to the date of presumptive first payment.

REASONS FOR ALLOWING THE WRIT

The Court should grant this writ to the United States Court of Appeals for the Seventh Circuit in this case for two reasons. First, to resolve an intolerable conflict among the Circuits on the application of a provision of MPPAA which impacts directly on multiemployer pension plans every time an employer withdraws from a multiemployer plan. In this case, the Seventh Circuit joined the Fourth Circuit in conflict with the Third Circuit on the interpretation of a critical provision in MPPAA. The Seventh Circuit's interpretation of MPPAA resulted in a reduction of several million dollars in the amount Schlitz was required to pay to the Plan. The conflict creates an intolerable situation for multiemployer pension plans and participating employers because it makes it impossible to calculate the amount of withdrawal liability without a determination of which interpretation of MPPAA will apply to a particular withdrawal.

The Court should also allow this writ because this case presents a significant question of federal law which directly impacts virtually every multiemployer defined benefit pension plan in the country, the collective bargaining process typically surrounding such plans, every contributing employer and every participant in multiemployer defined benefit pension plans.[4] The Court should allow this

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[4] In its 1992 Annual Report, released on February 23, 1993 the Pension Benefit Guaranty Corporation (PBGC) reported that

(continued...)

writ to confirm that Congress intended to make decisions which directly impact vested pension benefits, such as the selection of the method for calculating withdrawal liability, subject to fiduciary duties and not the subject of negotiation.

I.

THIS COURT SHOULD ALLOW THE WRIT OF *CERTIORARI* TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE INTERPRETATION OF A SIGNIFICANT PROVISION OF MPPAA WHICH MUST BE APPLIED EACH TIME AN EMPLOYER WITHDRAWS FROM A MULTIEMPLOYER PENSION PLAN.

Each time an employer withdraws from a multiemployer defined benefit pension plan, the plan is required to calculate that employer's liability for the unfunded, vested benefits. In many multiemployer plans, contributing employers and participants are located in many different federal judicial circuits. MPPAA provides the plan with some guidelines for calculating a withdrawing employer's liability. One of Congress' goals in enacting MPPAA was to provide plans and contributing employers with some degree of certainty about the amount of withdrawal liability.

MPPAA provides that the amount of an employer's withdrawal liability is calculated as of the end of the year **prior** to the year in which the withdrawal occurs. 29 U.S.C. § 1391(c)(2)(C)(i). In virtually every instance, because of the amount of the liability, a withdrawing employer will choose to make payments to the plan over time. MPPAA provides that payments are **amortized** based upon the assumption that the first payment was made on the first day of the

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[4] (...continued)
there are 8.9 million participants in about 2,000 multiemployer plans. The PBGC estimates underfunding of those plans at approximately $11 billion. The PBGC is estimating its liability for multiemployer plans which may require financial assistance at $145 million.

plan year **following** withdrawal. 29 U.S.C. § 1399(c)(1)(A)(i). Thus, there is a "gap" of one year between the date used to calculate a withdrawing employer's liability and the date on which the first payment is presumptively made.

The Third Circuit has interpreted MPPAA to permit plans to include in the amount of withdrawal liability interest for this "gap" year. In this case, the Seventh Circuit joined with the Fourth Circuit in prohibiting plans from including "gap year" interest. In this case, as in many others, the difference in the amount of withdrawal liability can amount to several million dollars[5] depending upon whether the Third Circuit's or the Fourth and Seventh Circuits' interpretation is applied. This Court should resolve this intolerable conflict so that the mere fortuity of the geographic location of a particular employer or plan does not significantly alter the amount of withdrawal liability imposed on a withdrawing employer. The Court should also resolve the conflict because multiemployer plans, as well as participating employers, need to be able to calculate their withdrawal liability without first resorting to difficult choice of law analysis. As long as the conflict remains, litigation over which Circuit's law should apply will needlessly devour judicial resources.[6]

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[5] In this case, Schlitz withdrew from the Plan in August 1981. Therefore, under MPPAA, the Plan calculated Schlitz' liability as of December 31, 1980 and it calculated the amortized payments as if the first payment was not made until January 1, 1982. The Plan included interest on the amount of that liability for the year of 1981. Interest for the "gap year," December 31, 1980 through January 1, 1982, amounted to $1,631,000. Because Schlitz was allowed to pay this interest over time, including the "gap year" interest added an additional $2,619,041 to Schlitz' total withdrawal liability.

[6] The fact that in three years, three federal courts of appeals have addressed this issue demonstrates that it is an important recurring issue.

In 1990, the Third Circuit held that because MPPAA requires an **amortization** of payments **as if** the first payment was made on the first day of the plan year **following** withdrawal, *see* 29 U.S.C. § 1399(c)(1)(A)(i), interest for the period from the date used to calculate the liability to the date the first payment is presumed to have been made should be included in the amount of a withdrawing employer's liability. *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 97 (3d Cir. 1990). In 1992, the Fourth Circuit rejected the analysis in *Huber* and in *Borden, Inc. v. Bakery Confectionery Union & Industry Pension*, 974 F.2d 528 (4th Cir. 1992), held that because MPPAA did not explicitly provide for interest during this period, the plan had no authority to include interest for that period in the amount of an employer's withdrawal liability. In this case, the Seventh Circuit joined with the Fourth Circuit in holding that MPPAA does not authorize assessment of interest before the employer's obligation to pay arises, *Schlitz*, Slip op. at p. 17.[7] Thus, the holding in this case adds to the confusion in an already complex area. Until this confusion is resolved, litigation over this issue will continue. This Court should allow the writ to resolve this conflict and to eliminate the costly litigation this conflict will foster. It is not difficult to imagine the race to the Courthouse in an effort to take advantage of favorable law in a particular Circuit.

In *Huber*, the Third Circuit engaged in a careful and thorough analysis of this issue. In reaching its conclusion, the Court noted that the MPPAA scheme of payments is similar to an immediate annuity concept rather than an

[7] The Seventh Circuit suggested, without answering the question, that this provision of MPPAA might allow the plan to charge interest from the date of actual withdrawal to the date the first payment is presumed to have been made. Slip op. at 18. Thus, the opinion in this case leaves open the possibility of a third different interpretation of the same provision of MPPAA.

annuity-due concept. The Court explained the distinction as follows:

> All other factors being equal, the amortization period for an annuity-due will be shorter than that of an immediate annuity because the first payment of an annuity-due is made at the beginning of the interval, and is therefore applied entirely to principal—no interest has yet accrued. On the other hand, a significant portion of the first payment of an immediate annuity is applied to interest—the interest on the principal for the first interval,

916 F.2d at 98.[8] Because MPPAA provides for a calculation date in one year and a first payment date at the beginning of another, Congress clearly intended for the payment plan to follow the immediate annuity concept. 916 F.2d at 98. The immediate annuity concept provides for interest from the date liability is fixed until the date of the first payment by increasing the total liability to reflect interest for that period. In this regard, the amortization schedule for withdrawal liability is similar to a mortgage. While the first payment on a mortgage may not be due until one month after the loan proceeds are disbursed, interest for that month is not waived, it is incorporated into the total debt and amortized over the life of the loan.

In *Huber*, the Court went on to note that the PBGC had submitted an amicus brief conceding that it could not ascertain the intent of Congress on this issue but arguing that because MPPAA does not specifically provide for the interest in that period, it should not be allowed. 916 F.2d at

[8] Although far from persuasive and not relied upon by the Court in *Huber*, the only potentially applicable legislative history supports the conclusion that Congress intended to allow the plans to include "gap year" interest in the amount of a withdrawing employer's liability. *Huber*, 916 F.2d at 98 n. 30.

96-7.[9] However, the Court rejected the PBGC's argument, concluding that it was not supported by the overall scheme set up by Congress for calculating the amount of a withdrawing employer's liability.

The Court in *Huber* also rejected the employer's plea that it was being penalized or charged double interest. The Court noted that an employer could avoid this possibility by withdrawing near the end of the plan year. Moreover, the Court recognized that in setting forth the method for calculating withdrawal liability, Congress was interested in rough equity, not precision. 916 F.2d at 85. Thus, in *Huber*, the Court carefully and convincingly refutes the arguments made by Schlitz and accepted by the Seventh Circuit in this case.[10]

On the other hand, the Courts' analysis in this case and in *Borden* ignores a fundamental rule of statutory construction which requires, whenever possible, that no portion of the statute be rendered inoperative. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Anna*, 472 U.S. 237, 249 (1985). In MPPAA Congress did not explicitly provide for interest in this "gap" period. However, in § 1399(c)(1)(A)(i), Congress provided that the amount of a withdrawing employer's liability would be paid over the period of years necessary to **amortize** the amount calculated **as if** the first payment **were made** on the first day of the plan year following the plan year in which the withdrawal occurs and **as if** each subsequent payment were made on the first day of each subsequent year. In the very same section, Congress recognized that the date of the actual first payment will not necessarily be consistent with the date used for the purpose of amortizing the payments.

If the Court in *Borden* is correct, then the distinction in § 1399(c)(1)(A)(i) of MPPAA between the date the first payment is presumed to have been made and the date the first payment is actually to be made is superfluous. If Congress intended to exclude interest for this period, it could have specifically done so, or it could have simply provided that the payments be amortized as if the first payment was made on the date MPPAA requires the payment to actually be made. This Court should allow the Petition for *Certiorari* to resolve the conflict among the Circuits and ultimately reject the superficial analysis in this case and in *Borden* in favor of the more well-reasoned opinion in *Huber*.[11]

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[9] The Plan has been unable to locate any other case in which the PBGC has addressed this issue. It is, therefore, not clear whether the PBGC continues to maintain this position. The Seventh Circuit correctly refused to give any weight to the PBGC's litigating position in another case. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988); Slip op. at 16.

[10] The Court in *Huber* refused to allow interest from the assumed date of the first payment as provided in 29 U.S.C. § 1399(c)(1)(A)(i) to the date an actual payment is made in accordance with § 1399(c)(2). The Plan has not requested interest for any similar period in this case.

[11] The reported arbitration decisions on this issue are also split. *See Loomis Armored, Inc. v. Central States Pension Fund*, 8 EBC 1899 (1987) (interest for year of withdrawal properly included); *Carnation Co., Inc. v. Central States Pension Fund*, 9 EBC 1409, 1449 (1988) (assessment of interest for withdrawal year is not proper).

II.

THIS COURT SHOULD ALLOW THE WRIT TO ADDRESS A SIGNIFICANT QUESTION OF FEDERAL LAW WHICH DIRECTLY IMPACTS: EVERY MULTIEMPLOYER DEFINED BENEFIT PENSION PLAN IN THE COUNTRY; EVERY EMPLOYER PARTICIPATING IN THOSE PLANS; EVERY EMPLOYEE AND THEIR BENEFICIARIES COVERED BY THOSE PLANS; AND THE COLLECTIVE BARGAINING PROCESS SURROUNDING THOSE PLANS—WHETHER CONGRESS INTENDED THAT THE PARTY SELECTING THE METHOD FOR CALCULATING WITHDRAWAL LIABILITY HAS A FIDUCIARY RESPONSIBILITY TO THE PLAN'S PARTICIPANTS AND BENEFICIARIES.

In MPPAA, Congress imposed, for the first time, liability on an employer withdrawing from an under-funded defined benefit multiemployer pension plan. "Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement-and if he has fulfilled whatever conditions are required to obtain a vested benefit-he actually will receive it.' " *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 721 (1984) (quoting *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 375 (1980)). Congress provided a method for calculating withdrawal liability, 29 U.S.C. § 1391(b), which is presumptively applied unless a particular plan has been amended to provide for one of the other permissible methods for calculating withdrawal liability or a method specifically approved by the PBGC. In this case, Schlitz as well as the Union and the other employers were aware that the presumptive method would automatically apply unless the Plan was amended.

One of the acceptable alternative methods is described as the direct attribution method because it attempts to attribute the portion of the unfunded liability directly to the employer who received the benefit of the work from the employees who earned the defined vested benefits. 29 U.S.C. § 1391(c)(4)(A). Although MPPAA provides that a

plan can be amended to choose an alternative to the presumptive method, it does not designate who may make such an amendment. In this case, the Plan could be amended by mutual agreement of the Union and the Employers. Thus, Schlitz and the other employers retained for themselves the right to select the method to be used to calculate the liability of a withdrawing employer.

Schlitz conceded that it was in favor of the presumptive method for calculating withdrawal liability because that method was in Schlitz' best interest (Transcript Volume I, 8/11/87 at 104). The Union, Miller and Pabst all agreed that the direct attribution method was in the best interest of the Plan, its participants and beneficiaries (Transcript Volume II, 8/12/87 at 271; Transcript Volume III, 8/14/87 at 545). The Plan has argued that because the responsibility for selecting the method used to calculate a withdrawing employer's liability is a fiduciary function, when Schlitz retained that responsibility, it also accepted a fiduciary duty to select the method for calculating withdrawal liability which was in the Plan's best interest. Therefore, Schlitz cannot hide behind its lack of consent to a change from the presumptive method to the method in the Plan's best interest. Obviously, whether the party which has responsibility for selecting the method for calculating withdrawal liability is performing a fiduciary function has far ranging implications for multiemployer plans, participating employers, and employee participants and their beneficiaries. The Seventh Circuit held that Congress did not intend that the party selecting the method for calculating withdrawal liability be subject to fiduciary duties to the plan participants. Slip op. at 11-14.

This Court should allow the writ to address the important federal question presented by this issue and ultimately to correct the erroneous decision of the Seventh Circuit which has ramifications far beyond the parties in this case. The language and structure of The Employee Retirement Income Security Act of 1974 (ERISA) and

MPPAA demonstrate that Congress intended the selection of the method for calculating withdrawal liability to be a fiduciary function. The legislative history confirms that Congress intended for the method of calculating withdrawal liability to be subject to fiduciary duties. Every other Court, including this Court recently in *Concrete Pipe And Products of California, Inc. v. Construction Laborers Pension Trust For Southern California*, ___ U.S. ___, 113 S.Ct. 2264, 2276-78 (1993), which has considered MPPAA's withdrawal liability provisions, has observed or assumed the obvious, that persons with fiduciary obligations to the Plan will make the decision about the method used to calculate withdrawal liability.

The potential ramifications of the Seventh Circuit's erroneous decision reach far beyond the impact on Schlitz and the participants in this multiemployer plan. The Seventh Circuit's opinion encourages all multiemployer plans to reserve to the participating employers the right to select the method for calculating withdrawal liability and, thereby, eliminate any responsibility to the plan participants for the consequences of that decision. The Seventh Circuit purports to leave the decision of selecting a method for calculating withdrawal liability to the free market forces of the collective bargaining process. Slip op. at 13. Unfortunately, those who are most directly impacted by the decision are not represented in the process.[12] Moreover, Congress through MPPAA, has provided a tremendous advantage to those parties in that process which favor the presumptive method. The lack of agreement on another method results in the automatic application of the presumptive method, regardless of its impact on the particular plan

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[12] While the union represents the plan participants in the collective bargaining process, the Union must be concerned with more than just providing for funding of unfunded, vested pension benefits. Accordingly, the Union acting in its own best interest may not chose a method for calculating withdrawal liability in the plan's best interest.

or participating employer. If the method for calculating withdrawal liability is, as the Seventh Circuit holds, a subject for collective bargaining, the NLRB will soon be charged with attempting to determine whether the parties are negotiating in good faith on that issue. Because of the far reaching implications for this decision, this Court should give careful consideration to the ease with which the Seventh Circuit ignored the language and structure of MPPAA, existing precedent and legislative history.

Although the Seventh Circuit's task is to determine Congressional intent, noticeably absent from the Seventh Circuit's opinion is any discussion of the structure of the language used in ERISA and MPPAA which give significant clues to Congress' intent, the legislative history which makes absolutely clear Congress' intent and the observations of the various Courts, including this Court, which have considered the withdrawal liability provisions in MPPAA. The Seventh Circuit should have started its analysis with the plain language of ERISA and MPPAA. ERISA provides a general description of fiduciary functions which includes exercising discretionary authority or discretionary control over management of a pension plan. 29 U.S.C. § 1002(21)(A)(i). Selecting the method a plan will use to determine what portion of its unfunded vested liability must be satisfied by a withdrawing employer is management of the plan. The Seventh Circuit rejected this argument and characterized the decision relating to withdrawal liability as establishing the terms of the Plan. Slip op. at 12. This analysis simply fails to grasp the impact the selection of a method for calculating withdrawal liability can have on the plan.

Allocating unfunded liability to a particular employer has far more impact on the plan than simply deciding which employer will ultimately bear the largest burden for the unfunded benefits. Obviously, allocation may bear upon the collectability of the funds. Delay and additional administrative costs associated with pursuing a financially

weakened or bankrupt employer or perhaps a claim with the PBGC may reduce the fund's ability to make the vested, earned benefit payments. Allocation has a direct impact on the financial health and stability of the remaining employers who, in multiemployer plans, are often competitors. A plan must be concerned with the financial stability of contributing employers.

Allocation impacts future wages and benefits to plan participants as the remaining employers struggle to cover inherited unfunded liability or are relieved from that burden. The method selected may trigger an employer to withdraw from a plan in order to take advantage of a method which it believes is favorable. Implementing one method may result in significant administrative costs to a plan which are not associated with other methods. Determination of which method for calculating withdrawal liability is in the best interest of the plan's participants and beneficiaries requires a balancing of these and other factors. As explained below, because it is necessary to balance competing factors, Congress made it clear that in calculating withdrawal liability, the fiduciary has broad discretion to select a method which is in the plan's best interest.

It is essential to keep in mind that at issue here is the funding of benefits which have been earned, by employees in many cases over a lifetime of work for the same company or in the same industry and that the employees and their beneficiaries rely on those benefits for retirement. If the funding of vested pension benefits is left to negotiations between the union and the various employers, the interests of the plan participants will not be represented in that process. Each employer will consider how a particular method impacts its own bottom line. In collective bargaining negotiations, the Union must be concerned with more than just the funding of an under-funded defined benefits plan. If the crucial and often difficult decision relating to withdrawal liability is left to negotiations, those who will be most directly affected by a negative impact on the plan will

be excluded from the very process by which a calculation method is selected. Selection of the method for calculating withdrawal liability is fundamentally a matter of plan management. The selection is a fiduciary function and should be made solely in the best interest of the plan's participants and their beneficiaries.

The Plan does not contend that all plan amendments impose fiduciary duties on the party making the amendment, but rather only that those amendments which impact vested benefits in a defined benefit plan are fiduciary functions. It is clear that employers can play multiple roles when dealing with issues relating to welfare and pension plans. *Ladish Co., Inc. v. International Ass'n of Machinist & Aerospace Workers, Dist. No. 10*, 966 F.2d 250, 253 (7th Cir. 1992); *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir. 1988), *cert. denied*, 488 U.S. 981 (1988); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1266-68 (7th Cir. 1985). Some aspects of a pension plan such as the terms and conditions of future benefits which are not vested are subject to negotiation. *United Independent Flight Officers*, 756 F.2d at 1268. An employer such as Schlitz does not have any fiduciary duty to the beneficiaries of a plan when acting on an issue which is subject to negotiations. *Id.* On issues subject to negotiation, an employer is free to act in its own best interest. *Id.* For example, in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 816-818 (7th Cir. 1992), *reh'g. en banc. denied*, 962 F.2d 655, *petition for cert. filed* (Aug. 3, 1992), the Seventh Circuit held that an employer had no fiduciary obligation to continue providing health benefits after the contract providing for those benefits expired. Similarly, in *Young*, 849 F.2d at 1045, the Court held that an employer does not owe a fiduciary duty when it amends or abolishes a severance benefit plan. These types of amendments are the subject of negotiation. In this case, however, the Seventh Circuit has crossed the line it had previously established.

In both *Young*, 849 F.2d at 1045 and *United Independent Flight Officers*, 756 F.2d at 1280, the Seventh Circuit carefully limited its holdings to amendments which impacted terms and conditions of future pension benefits, where those benefits are not protected under ERISA's vesting and non-forfeitability provision. In this case, the plan amendment relates to a defined benefit plan and impacts vested benefits in that plan. When an employer is engaged in a fiduciary function, the employer must act solely to benefit the plan, its participants and beneficiaries. *Ladish*, 966 F.2d at 254. A particular activity cannot be both subject to negotiation and a fiduciary function. *NLRB v. Amax Coal Co., Div. of Amax, Inc.*, 453 U.S. 322, 336 (1981), *reh'g denied*, 453 U.S. 950 (1981); *United Independent Flight Officers*, 756 F.2d at 1268. Because the plan amendment permitted by 29 U.S.C. § 1391 impacts vested benefits in a defined benefit pension plan, when considering such an amendment, an employer is engaged in a fiduciary function.[13]

It is important to note that Section 1401(a)(3)(A) provides for a presumption that certain determinations made by the plan sponsor, including those determinations permitted by Section 1391, are correct. If the selection of a method for calculating withdrawal liability was subject to negotiation, there would be no reason to include it within the scope of this presumption. A negotiated selection would never be challenged in arbitration under MPPAA. Moreover, when Congress wanted to provide for employer consent to an amendment, it did so directly. 29 U.S.C. § 1394(a). In addition, Congress provided that the PBGC when it considers whether to approve an amendment

[13] The employers in this case could have avoided the dual loyalty problem if they had granted the Joint Committee the authority to make this decision. In many multi employer plans, the employers have shifted that responsibility to others. In light of the Seventh Circuit's decision in this case, employers will likely want to retain this important responsibility for themselves.

providing for a method unique to a particular plan, it would disapprove the method only if it determined that the amendment created an unreasonable risk to the plan, its participants and beneficiaries or to the PBGC. 29 U.S.C. § 1400(c). Congress was clearly concerned with the welfare of the plan.

Thus, both the general description of fiduciary functions and the provision which allows for selection from among alternative methods for calculating withdrawal liability are consistent with the conclusion that the selection is a fiduciary function. The statute, however, does not clearly resolve the question of whether Congress intended the selection of a method for calculating withdrawal liability to be a fiduciary function. Accordingly, it is appropriate to look to the legislative history to discover Congress' original intent. *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989). If the language of the statutes leaves any doubt as to Congress' intent, the legislative history eliminates that doubt.

The legislative history of MPPAA's withdrawal liability provisions has been extensively quoted, cited and analyzed in numerous cases. *See, eg., Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 212-216 (1986); *Pension Ben. Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 721-725 (1984); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1251-52 (7th Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984). ERISA was Congress' first effort at comprehensive regulation of pension funds. *Peick*, 724 F.2d at 1251. Among the principal purposes of ERISA was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the Plan. *R. A. Gray & Co.*, 467 U.S. at 721. Congress wanted to guarantee that if a worker has been provided a defined pension benefit upon retirement and he has fulfilled the conditions required to obtain a vested benefit, he would actually receive it. *Id.*

With respect to the new employer withdrawal liability provisions, Congress noted that the new provisions would help to insulate a plan from the adverse effects of a sustained decline in the contribution base. H. R. Rep. No. 869, 96th Cong. 2d Sess. 67, *reprinted in* 1980 U. S. Code Cong. & Ad. News at 2935. Significantly, referring to alternative methods for calculating withdrawal liability, the Committee stated: "Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens and protecting the financial soundness of the fund." H. R. Rep. No. 869, 96th Cong. 2d Sess. 67, *reprinted in* 1980 U. S. Code Cong. & Ad. News at 2935. The Committee made it clear that, because of the competing considerations, choosing a method for calculating withdrawal liability which would eliminate or reduce the liability was not a *per se* violation of a fiduciary duty but the fiduciaries' conduct in calculating the withdrawal liability would be measured by whether they acted reasonably and in the interest of the Plan participants and beneficiaries.

> Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens and protecting the financial soundness of a fund. The Committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not *per se* a violation of a fiduciary standard; the determination must be made as to whether the fiduciary has acted reasonably and in the interests of plan participants and beneficiaries and otherwise in accordance with the fiduciary standard.

Id. This legislative history makes it clear that Congress intended for the selection of a method for calculating withdrawal liability to be a fiduciary function with the sole

focus the best interest of the plan, its participants and beneficiaries.

Various aspects of MPPAA's withdrawal liability provisions have been subject to numerous constitutional challenges. Almost without exception, whenever a court has analyzed or discussed Section 1391 it has noted or simply assumed the obvious, that is, a party or parties with fiduciary obligations to the plan would select the method for calculating withdrawal liability. For example, recently this Court in *Concrete Pipe And Products Of California*, 113 S.Ct at 2276-79, assumed that a party with fiduciary responsibilities to the plan would be making decisions subject to the presumption of correctness contained in 29 U.S.C. § 1401(a)(3)(A). Similarly, in *Peick*, 724 F.2d at 1256, in discussing MPPAA's withdrawal liability provisions, the Seventh Circuit previously noted that **trustees** have substantial discretion in deciding how much to assess any given employer or employers. Referring to Section 1391, the Court continued: "Thus, the statute lists several different methods of allocating a Plan's unfunded vested liability, and it further empowers the **trustee** to seek PBGC approval of a completely different method of their own design," 724 F.2d at 1256 (emphasis added). *See also Robbins v. Pepsi Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 674 (N.D. Ill. 1986), *stay pending appeal denied*, 800 F.2d 641 (7th Cir. 1986).

In *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), the Court held that statutory presumptions of correctness combined with a **trustee's** bias toward maximizing withdrawal liability deprives a withdrawing employer of a right to a fair hearing and is, therefore, an unconstitutional deprivation of due process. In reaching this conclusion, the Court noted that: "While the *trustees* must apply their chosen method uniformly among withdrawn employers, the statute leaves them free to pick among the four suggested methods or to

chose their own." 787 F.2d at 140. This Court affirmed the judgment by an equally divided Court in a *per curiam* order. *Pension Ben. Guaranty Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

In *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1141 (1st Cir. 1985) (*en banc*), the Court also held that because the *trustee's* discretion relating to the calculation of withdrawal liability is limited after the first employer withdraws, the presumption in favor of the correctness of the trustee's withdrawal liability calculations does not violate due process. While reaching different ultimate conclusions on the constitutionality of the presumption afforded to the decision, both the First Circuit and Third Circuit agreed that at least the first time an employer withdraws, MPPAA gives the *trustee* the initial choice for allocating the fund shortfall by selecting one from a number of procedures prescribed by Congress. 762 F.2d at 1141. In similar contexts all the Courts which have considered MPPAA's withdrawal liability provisions, other than in this case, have made similar observations. *See, Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984), *cert. denied sub nom; Sibley, Lindsay & Curr, Co., Div. of Associated Dry Goods Corp. v. Bakery, Confectionery & Tobacco Workers International Union*, 467 U.S. 1259 (1984); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C.C. 1984); *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

In the light of the plain language of the statute, the legislative history and the analyses in these cases, it is beyond doubt that Congress intended for the selection of the method for calculating withdrawal liability to be a fiduciary function. As such, any party responsible for making that selection had to act solely in the best interest of the Plan, its participants and beneficiaries. 29 U.S.C.

§ 1104. The Seventh Circuit ignored all traditional indications of legislative intent in order to be able to substitute its view for the intent of Congress.

Apparently in an effort to discourage further consideration of the important legal issue, the Seventh Circuit went on to make a finding of fact. The Court found that the Record did not contain sufficient evidence to establish that the direct attribution method was better for the Plan than the presumptive method. Slip op. at 14. In making the finding of fact, the Seventh Circuit disregarded the presumption of correctness built into MPPAA in 29 U.S.C. § 1401(a)(3)(A), which this Court recently examined and found constitutional in *Concrete Pipe*, 113 S.Ct. at 2283. This Court held that Congress clearly intended to shift the burden of persuasion to the employer in a factual dispute. 113 S.Ct. at 2283. In this case, the Plan made a factual determination that the direct attribution method was in its best interest in 1981. Schlitz, therefore had the burden in the first instance to present contrary evidence. The record is clear that Schlitz has not met that burden. Therefore, the Seventh Circuit's fact finding erroneously fails to consider the appropriate burden of proof under MPPAA and it should be disregarded.[14]

CONCLUSION

This case presents the Court with the opportunity to resolve an intolerable conflict among the Circuits on the interpretation of a provision of MPPAA which is utilized every time an employer withdraws from a multiemployer plan. It also provides this Court with the opportunity to consider the decision of the Seventh Circuit that Congress did not intend the selection of the method for calculating

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[14] Neither the arbitrator nor the District Court made a finding of fact on this issue.

withdrawal liability to be a fiduciary function. This decision is on a significant question of federal law which has wide-ranging ramifications. It is also inconsistent with the language and structure of MPPAA, the legislative history of the Act and the cases which have considered the withdrawal liability provisions. Accordingly, the Milwaukee Brewery Workers' Pension Plan respectfully requests that this Court allow the Petition for *Certiorari* to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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EXHIBIT A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-3811 & 92-3894

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,

Plaintiffs-Appellees, Cross-Appellants,

v.

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 88-C-908—**Robert W. Warren**, *Judge.*

ARGUED MAY 7, 1993—DECIDED AUGUST 13, 1993

Before BAUER, *Chief Judge*, and CUMMINGS and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Three brewers in Milwaukee—Schlitz, Miller, and Pabst—contributed to a multiemployer pension plan. The brewers also bargained jointly with the union over wages, pensions, and other benefits, and administered the pension plan. In 1981 Schlitz closed its Milwaukee brewery. (Schlitz has since been acquired by Stroh; we use its old name for clarity.) We must decide how much Schlitz owes as withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

I

Several sets of documents govern relations between the Milwaukee Brewery Workers' Pension Plan and the Milwaukee Brewers' Association (the employers' collective bargaining group). An Association Agreement provides that the Labor Committee of the Brewers' Association may make decisions only by consensus: "All decisions and action taken by the . . . Labor Committee shall be by unanimous vote of the respective committee, with each brewery having a reasonable opportunity to cast its vote on the question." The Plan was managed and administered by a Joint Committee consisting of four members appointed by the union and four members appointed by the employers. This committee was bound by the agreement establishing the Plan. That agreement could be amended by the "mutual agreement of the Union and the Employers". So changes in the Plan required the assent of both labor and management, which had agreed to act by consensus. When the consensus ended the difficulties began.

Schlitz withdrew from joint bargaining in January 1981 because it thought the other employers too willing to accept the union's demands. When giving notice of this withdrawal, Schlitz stated that it would continue to sit on the Plan's Joint Committee and participate in the Plan. On June 1, 1981, the union struck Schlitz, which responded by closing its Milwaukee brewery. On August 14 the Schlitz representative on the Joint Committee resigned, and Schlitz withdrew from the Plan. At the time, the Plan was underfunded to the tune of $111 million. Inflation was high, leading the Plan to estimate big future obligations to pay benefits, while steep interest rates had depressed the capital value of the Plan's existing assets. Schlitz estimated that it would be responsible for $27 million of this shortfall under the "presumptive method" that the MPPAA specifies when a pension plan has not adopted another method of allocation. 29 U.S.C. §1391(b).

Withdrawal liability under the presumptive method depends on "the proportion of total employer contributions

to the plan made by the withdrawing employer during certain 5-year periods. In essence, the withdrawal liability imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's share of contributions to the plan during the years of its participation." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2273 (1993) (citations omitted). Under the "direct attribution" method, which the MPPAA permits most plans to elect, each employer is responsible for that portion of the unfunded, vested liabilities earned by its current and former employees. 29 U.S.C. §1391(c)(4). See *Artistic Carton Company v. Paper Industry Union-Management Pension Fund*, 971 F.2d 1346, 1349-50 (7th Cir. 1992). Miller and Pabst began to discuss adopting the direct attribution method, which altered the employers' shares of the $111 million. According to their memos, these were the options:

	Method of Attribution	
Brewer	Direct	Presumptive
Miller	$31,100,000 (28%)	$45,500,000 (41%)
Pabst	38,800,000 (35%)	38,800,000 (35%)
Schlitz	41,100,000 (37%)	26,700,000 (24%)

Miller, Pabst, and the union entered into memoranda of understanding in May 1981 purporting to amend the Plan to adopt the direct attribution method. Schlitz's assent was neither sought nor secured. On August 17, 1981, the remaining members of the Joint Committee directed the Plan's actuary to calculate Schlitz's withdrawal liability under the direct attribution method. Schlitz first learned of the change in funding method when it received notice in September 1981 that it owed $41,031,406. Schlitz demanded arbitration under 29 U.S.C. §1401(a)(1).

Arbitrator Siegel concluded that the Plan could be amended only by unanimous consent. 9 E.B.C. 2385 (1988). In May 1981, when Miller, Pabst, and the union tried to adopt the direct attribution method, Schlitz was still a

contributing employer and held a seat on the Joint Committee. Lack of unanimity left the presumptive method in effect. The parties' actuaries jointly concluded that under the presumptive approach (and using actuarial assumptions not at issue here) Schlitz owed only $23.3 million; the arbitrator incorporated that figure into his award. 9 E.B.C. 2689 (1988). The Plan petitioned for review in the district court, which agreed with the arbitrator's use of the presumptive method but added interest for the year in which Schlitz withdrew from the Plan, plus prejudgment interest on this interest. Both sides appeal. The district judge neglected to determine the amount of prejudgment interest, which usually is essential to finality (and thus appealability). *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). But the parties reached an agreement on the subject. The district court's order of October 20, 1992, apparently accepts this agreement, and Schlitz has paid in full. So although the district court has not entered the form of judgment required by Fed. R. Civ. P. 58, its decision of October 20 is nonetheless appealable under the approach of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978).

II

The extent of Schlitz's liability turns on whether it is bound by the purported modification of the Plan in 1981. Was the change by the "mutual agreement of the Union and the Employers", as the Plan's governing document provides? The Plan does not deny that Schlitz was a participating "employer" in May 1981. Schlitz argues that the ordinary understanding of "mutual", consistent with the Association Agreement's rules for decisionmaking, means that the Plan remains unchanged unless the employers agree unanimously to change it. Schlitz was not aware of, and did not agree to, the change in May 1981. The Plan tells us, however, that Schlitz's lack of assent is irrelevant. On its reading, "mutual agreement" does not mean that the Plan's participating employers must reach consensus. To the contrary, once Schlitz left the Brewers'

Association, it subjected itself to the risk that the remaining members—its competitors—would "mutually" agree with the union to amend the Plan in a way singularly disadvantageous to Schlitz. Arbitrator Siegel agreed with Schlitz, interpreting the phrase "mutual agreement" to mean "agreement by all"—that is to say, all "employers" contributing to the Plan, as opposed to the two employers still engaged in joint bargaining with the union.

Although the parties argue this appeal as if this court's role is to interpret the documents from scratch, neither side explains why. We are a court of review and not of first instance. A vital issue in many appeals, including this one, is the standard of review—that is, the relation between this tribunal and its predecessors. On most issues appellate review is deferential. When an arbitrator makes the initial decision, judges have only a modest role to play. *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764 (1983). Cases under the Arbitration Act, 9 U.S.C. §§ 1-16, or arising out of collective bargaining agreements, usually present a simple question: did the arbitrator interpret the parties' agreement, or did he apply a rule he preferred to their agreement? If the former, the award is enforced; if the latter, not. *Hill v. Norfolk and Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987). Arbitrator Siegel unquestionably interpreted the Association Agreement and the Plan's governing documents; he tried to carry out the parties' rules rather than invent his own, and no one contends that the award is marred by fraud or corruption. See 9 U.S.C. §10. If this were a standard labor or commercial case, we could end here.

Aspects of this case resemble ordinary labor and commercial disputes. The Plan was created by labor and management, and a clause provides for arbitration in the event the Joint Committee is unable to resolve a dispute. Had today's case arisen before 1980, then, arbitration would have occurred and the judicial role would have been minimal. But when enacting the MPPAA in 1980 Congress

complicated matters substantially by simultaneously incorporating most provisions of the Arbitration Act, 29 U.S.C. §1401(b)(3), while adopting a unique standard of review. Section 1401(c) provides that in a judicial proceeding to review or enforce an award, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. §1401(c). Conflating "clear and convincing evidence" with "preponderance of the evidence" to yield "clear preponderance of the evidence" would be bad enough if it referred to the task of a trier of fact; as a standard of review it makes no sense. As the Supreme Court remarked when trying to digest some related provisions of the MPPAA, Congress apparently confused the standards applicable to trial and reviewing bodies, producing an "incoherent" statute. *Concrete Pipe*, 113 S. Ct. at 2281. Repair is essential, and like the Court in *Concrete Pipe* we reconstruct by supplying the normal rules: the arbitrator acts by a preponderance of the evidence, and a reviewing body inquires whether the facts so found are "clearly erroneous." See *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Perhaps the "clearly erroneous" standard of review, rather than the "clear and convincing evidence" burden of persuasion, was the source of "clear" in §1401(c). No matter the source, the standard is one of deference to the person who hears the evidence—although not as deferential as the "reasonable person" standard that applies to ordinary arbitration. *Concrete Pipe*, 113 S. Ct. at 2279-80.

Section 1401(c) addresses findings of fact. What of legal questions? Facts are unique to the parties; law is general. The Pension Benefit Guaranty Corporation has provided that "[i]n reaching his decision, the arbitrator shall follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with enforcement of the Act, and other pertinent authorities," 29 C.F.R. §2641.4(a)(1). This regulation, promulgated under the PBGC's authority to interpret the MPPAA, *Concrete Pipe*, 113 S. Ct. at 2279, implies non-deferential review.

For this and related reasons we held in *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 211-12 (7th Cir. 1989), that the arbitrator's legal conclusions are subject to *de novo* review. Yet the dominant theme remains deference, which accounts for our decision in *Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1409-11 (7th Cir. 1989), that the arbitrator's application of law to fact—in the argot, a decision on "mixed questions of law and fact"—may be set aside only for clear error.

Where does the interpretation of pension plans and other agreements fit into this scheme? The answer within the world of litigation would be: It depends. Both the declaration of trust establishing the Plan and the Association Agreement are contracts. When a contract is clear, a court declares its meaning as a matter of law. When a contract is ambiguous, a court sends questions of interpretation to the trier of fact. *RTC v. M&L Investments*, 984 F.2d 190, 193 (7th Cir. 1993); *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1439 (7th Cir. 1992). And the existence of ambiguity can present formidable problems. Pension agreements do not get to be ambiguous because of parol evidence, such as the fact that an employer joined with its fingers crossed behind its back, *Central States ... n Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1... Cir. 1989) (in banc), or because of statements people ... to each other about the meaning of otherwise-clear documents, see *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608, 616 (7th Cir. 1993) (in banc). Still, ambiguous language (intrinsic ambiguity) or an unexpected application of language that appears clear in its linguistic context (extrinsic ambiguity) may pose problems for a trier of fact. *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989).

Courts ask whether the contract is "clear" in order to determine who makes the initial decision: judge or jury. Under the MPPAA, however, the arbitrator does the interpretation whether the text is clear or cloudy. Making the sorts of questions courts use to select between judge

and jury the key to review of the arbitrator's decision would add a layer of complexity to what should be a simple and expeditious system. Arbitration under the MPPAA is supposed to accelerate decision, but it has potential to delay matters by increasing from two to three the number of layers through which each dispute must pass; a debate in the district and appellate courts about whether the contract was clear (implying de novo review) or ambiguous (implying deferential review) would add to the potential for delay. Arbitrators serve a vital function in addition to speedy action: arbitrators may be chosen from persons knowledgeable about the industry and the kind of pension plan at issue, promoting accurate resolution of disputes. *I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1208 (D.C. Cir. 1984). What appears "clear" to a judge alien to the industry may be ambiguous to an expert versed in its nuances; what appears cloudy to a judge may speak plainly to an arbitrator who understands the problems and solutions of the trade. Thus an effort to tailor the standard of review to the *judge's* estimate of clarity could misfire. What is more, every time a court substitutes its judgment for that of the arbitrator, the benefit of proficiency is lost and disposition becomes more sluggish.

Because the parallel to labor and commercial arbitration is imperfect given the MPPAA's unique review provision—and because arbitration under the MPPAA sometimes is involuntary, and the standard of review must govern these cases as well as those in which the pension plan has its own arbitration clause—we adopt a standard that is slightly more demanding than the norm in labor law. Instead of asking only whether the arbitrator interpreted the contract (as opposed to making up his own rule), we ask whether the arbitrator adopted a reasoned interpretation of the documents. To avoid proliferation of standards (one novelty, in §1401(c), is quite sufficient) we draw an analogy to the relation between agency and court under the Administrative Procedure Act. An agency must give thoughtful consideration to the opposing arguments,

but a reviewing court does not ask whether the agency was "right." Instead it asks whether the decision was arbitrary or capricious, or otherwise not in accordance with law. That familiar standard should serve well under the MPPAA, a complex field in which the arbitrator serves in part as a surrogate for the PBGC. (The provisions of the MPPAA were designed in large measure to avoid a sequence of withdrawals that would shift liability to the guaranty fund maintained and administered by the PBGC.)

Is deferential review of the arbitrator's interpretation inconsistent with 29 U.S.C. §1401(a)(3)(A), which provides that "any determination made by a plan sponsor under [§§ 1381-99, 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous"? Not at all. Section 1401(a)(3)(A) establishes a presumption that the arbitrator must consider. It does not affect the allocation of interpretive authority between the arbitrator and a reviewing court. Just what §1401(a)(3)(A) *does* do was one of the subjects the Supreme Court considered in *Concrete Pipe*, where it understood this language to mean that in the proceeding before the arbitrator the employer must "disprove a [plan sponsor's] challenged *factual* determination by a preponderance" of the evidence. 113 S. Ct. at 2283 (emphasis added). There are no factual disputes in our case, and the Plan did not make any factual determinations to which the arbitrator owed deference.

Arbitrator Siegel's interpretation of "mutual agreement" to mean "by unanimous agreement of all parties concerned"—that "the Union and all the Employers agree to any amendment of the Plan", 9 E.B.C. at 2394—is neither arbitrary nor capricious. The "mutual agreement" language applies to all changes in the pension plan. A conclusion that Miller and Pabst could change the rules for computing withdrawal liability without Schlitz's assent would imply an equal power to increase the pensions and other benefits promised to labor, to increase the required

rate of contributions, and to make any other alteration. No sane firm gives its business rivals such power, and the arbitrator did not act whimsically in concluding that Schlitz had not done so. "Mutual agreement" reads naturally just as the arbitrator understood it, and the parties' own practice under this language was one of negotiating unanimous agreement before making any alterations in the Plan.

According to the Plan, ¶12.08(b)(13) of the Plan Document, which gives the Joint Committee power to interpret ambiguous language, means that the arbitrator could not disagree with the Joint Committee's assessment of withdrawal liability. *Concrete Pipe* scotches that contention by observing that a person ordered to pay a large sum of withdrawal liability is entitled to an independent review by a neutral decisionmaker. 113 S. Ct. at 2283. Withdrawal liability depends on the MPPAA, not on the parties' agreement, and the statute does not permit one person to make an unreviewable assessment against another. What is more, it distorts the events of 1981 to say that the Joint Committee "interpreted" any part of the Plan Document. Schlitz disputes the *validity* of an amendment to the Plan, not the *interpretation* of that amendment if the direct attribution method was properly adopted. Remember how the Joint Committee got involved: months after Miller, Pabst, and the union purported to amend the Plan, the Joint Committee instructed the Plan's actuary to calculate Schlitz's liability pursuant to the direct attribution method. The Plan has not provided us with any reason to believe that, in doing so, the Joint Committee itself interpreted "mutual agreement."

We can imagine one last argument. Might it be possible that, putting the machinations of May 1981 to one side, the remaining employers and the union properly amended the Plan in September 1981—after Schlitz's representative had withdrawn from both the Association and the Plan? Perhaps, but Schlitz would not be the worse for it. The MPPAA provides that amendments adopted after January 31, 1981, changing the method of calculating withdrawal

liability do not apply to an employer that withdrew before the amendment. 29 U.S.C. §1394(a). The rationale for this rule is the same as the rationale for unanimity in the Association Agreement: otherwise businesses can gang up to squeeze their competitor. Thus we accept the arbitrator's decision that the acts of Miller, Pabst, and the union in May and September 1991 did not adopt the direct attribution method—at least, did not adopt that method in a way that permits the Plan to apply it to Schlitz.

III

The Plan has a fallback position, with several steps. (1) When selecting a method of withdrawal liability, all three employers acted as fiduciaries to the Plan. (2) A fiduciary acting in May 1981 would have been required to prefer the direct attribution method to the presumptive method. (3) Had Schlitz attended the meetings in May 1981 it would have voted for the direct attribution method even though that disserved its own interests (and had Schlitz violated its fiduciary responsibility, a court would have intervened). (4) Because the direct attribution method *would* have been adopted by unanimous consent had Schlitz fulfilled its responsibilities, the arbitrator should have treated the Plan *as if* it had been amended.

There is a certain logic to this, but also an air of unreality. Pabst and Miller did not even invite Schlitz to the meetings. Having deprived it of an opportunity to act, they are scarcely in a position to dictate the outcome. Consider a parallel in corporate law. Members of the board of directors are fiduciaries. Corporations also have rules for determining the validity of the board's acts—quorum requirements and sometimes supermajority rules. Could a single member of the board change the corporation's bylaws, without calling a meeting (and necessarily without satisfying quorum and other requirements), by declaring that all fiduciaries *must* support his proposal, making a meeting superfluous? Most doubtful, yet this is what the Plan's position entails. At all events, the Plan's posi-

tion fails at the first step. Employers do not act as fiduciaries when establishing the terms of a pension plan.

According to the Employee Retirement Income Security Act (ERISA), to which the MPPAA belongs, a person is a fiduciary of a pension plan if:

> he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . .

29 U.S.C. §1002(21)(A)(i). The fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries". 29 U.S.C. §1104(a)(1). Managing a plan is some distance from establishing the *terms* of a plan. See *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1044-45 (7th Cir. 1988); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268-69 (7th Cir. 1985); *Amato v. Western Union International Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1161 (3d Cir. 1990); *Musto v. American General Corp.*, 861 F.2d 897, 911-13 (6th Cir. 1988); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432-33 (9th Cir. 1986). These and other cases hold that firms may set the terms of a pension plan, such as the level of benefits achieved after a given length of service, as employers rather than fiduciaries, a position that not only makes sense of the "management" language in ERISA but also recognizes that pension benefits are deferred compensation. Employers no more have a fiduciary obligation to assure larger pensions for their workers than they do to pay higher wages.

The Plan concedes that in establishing the level of benefits and the employers' contributions the brewers do not act as fiduciaries. Nonetheless it contends that amendments "which impact vested benefits in a defined benefit plan *are* fiduciary functions," (emphasis added), and that the choice of a method of determining withdrawal liability is one such amendment:

> [A]llocation may bear upon the collectability of the funds. Delay and additional administrative costs associated with pursuing a financially weakened or bankrupt employer . . . may reduce the fund's ability to make the vested, earned benefit payments. . . .
>
> Allocation impacts future wages and benefits to plan participants as the remaining employers struggle to cover inherited unfunded liability or are relieved from that burden. The method selected may trigger an employer to withdraw from a plan in order to take advantage of a method which it believes is favorable. Implementing one method may result in significant administrative costs to a plan which are not associated with other methods.

Of course one could say the same thing about levels of funding. If employers have a fiduciary obligation to use the method of computing withdrawal liability that maximizes the pension plan's current wealth, do they not have an even clearer obligation to increase their contributions so that the plan is not underfunded in the first place? Is not "underfunding" the most obvious breach of duty? Yet at oral argument the Plan (speaking for Miller and Pabst, no doubt) stoutly denied that employers have any fiduciary obligation to increase their payments to a plan in order to bring it to full funding. If selecting a level of funding is not a fiduciary obligation, how can selecting a method of computing withdrawal liability be?

Withdrawal liability is to be calculated pursuant to the presumptive formula in 29 U.S.C. §1391(b), but parties may select the direct attribution method, one of two other methods, or make up their own method with approval by the PBGC. 29 U.S.C. §1391(c)(5). Construction industry plans must use the presumptive method, §1391(c)(1), but others may select freely; the statute does not establish criteria under which a plan must adopt one method or another. The absence of criteria leaves the choice in private hands—which is to say that like levels of benefits it is a subject for contract rather than legal obligation.

A plan established jointly by labor and management is governed by the statutory obligation of good faith bargaining. 29 U.S.C. §158(d). But ERISA also governs pension and welfare plans established unilaterally, and employers are free to alter or disestablish these plans at will. *Electronic Workers v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991).

For what it is worth, we add that the second step of the Plan's argument is no more sound than the first. Each method produces a total of $111 million in withdrawal liability; only the allocation among employers is at issue. The Plan's expert testified before the arbitrator that the direct attribution method was in the Plan's best interest in 1981 because it accelerated the rate at which the Plan could become fully funded. Fundamentally, the expert testified that a bird in the hand is worth two in the bush. Miller, Pabst, and union representatives could have concluded, as this witness did, that direct attribution served the Plan's interests. We say "could have" because nothing in the record reflects that those who met in May 1981 acted as fiduciaries or, indeed, gave the slightest weight to the interests of employees with vested benefits. None of the contemporaneous documents so much as mentions the best interests of the Plan. Although the Plan talks on appeal about the necessity of matching the amount of withdrawal liability with each employer's financial strength, no such concerns surfaced during the discussions. Instead, each employer acted in its self-interest—Schlitz by bargaining independently, and Miller and Pabst by voting to shift more of the burden of the Plan's unfunded liability onto Schlitz. The papers document a series of attempts by each brewery to minimize its financial exposure while maximizing the obligations of its competitors. Maybe transferring a greater share to Schlitz increased the probability of collection, but Schlitz insists that in May 1981 Miller was best able to pay, and Miller's withdrawal liability went down. Nothing in the record demonstrates that firms with only the employees' interests at heart would have selected the direct attribution method.

Parties to a multi-employer pension plan may agree that decisions regarding allocation of withdrawal liability must be made in the plan's best interests, or subject to some other heightened standard. The parties to this Plan, however, reserved the subject to the collective bargaining process, in which each looked out for its own interests. Federal law does not prohibit that decision.

IV

The Plan's actuary includes, as part of Schlitz's withdrawal liability, interest for all of 1981. Arbitrator Siegel disallowed this interest as inconsistent with the MPPAA. The district judge disagreed and ordered Schlitz to pay the interest, plus prejudgment interest on that interest. The parties agree that the propriety of assessing this interest is a question of law, on which our review is plenary, rather than a question on which the arbitrator and courts must defer to the actuary under 29 U.S.C. §1401(a)(3)(B). See also *Concrete Pipe*, 113 S. Ct. at 2284-86.

Schlitz tells us that the district court's reading of the MPPAA conflicts with that of the PBGC, which has interpreted the statute to prohibit the assessment of such interest. If the PBGC had issued a regulation or other formal interpretation on the question, we would respect its judgment to the extent *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires. The PBGC has been delegated powers to enforce the MPPAA, see 29 U.S.C. §1303(e)(1), which usually leads courts to accept its understanding of that complex (and all too frequently ambiguous) law. E.g., *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989); *Allied Products Corp.*, 872 F.2d at 210 n.2; *Robbins v. McNicholas Transportation Co.*, 819 F.2d 682, 686 (7th Cir. 1987). Yet the PBGC has not issued any regulation or opinion on this subject. The interpretation to which Schlitz points appears in a brief filed as amicus curiae in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990). Courts do not defer to "agency litigating positions that are wholly un-

supported by regulations, rulings, or administrative practice." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). Only the agency, and not its lawyers, exercises delegated power. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Did that brief articulate the policy of the agency, or was it a concoction of appellate counsel? The PBGC did not participate in this case. Even were we sure that the position taken in *Huber* was the PBGC's rather than its lawyer's, see *Georgetown University Hospital*, 488 U.S. at 212; *Atlanta College of Medical and Dental Careers, Inc. v. Riley*, 987 F.2d 821, 828 n.10 (D.C. Cir. 1993); cf. *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171, 1179 (1991), we could not be sure that it subscribes to this view today. See *Mead Corp.*, 490 U.S. at 726 n.11. We must decipher the MPPAA for ourselves.

Multi-employer plans calculate their funding status only once per year, on December 31. If they are underfunded on that date, an employer withdrawing during the next year owes withdrawal liability in an amount determined by the December 31 calculation. 29 U.S.C. §1391(c)(2)(C)(i). An employer withdrawing in mid-year is entitled to amortize its liability over a period set by the Plan. Section 1399(c)(1)(A)(i) provides the rule under which the lump sum is converted to installments: "[A]n employer shall pay the amount determined under [§1391] . . . over the period of years necessary to amortize the amount in level annual payments . . . , calculated *as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs*" (emphasis added). In our case the Plan year apparently coincides with the calendar year. A withdrawing employer's schedule thus assumes a delay in payment—although the employer may pay sooner, and in our case it did so. Schlitz, which withdrew in August 1981, made its first payment on October 29, 1981. An assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct, would not be troubling. *Huber*, 916 F.2d at 98-100.

It may help to think of the employer as "borrowing" the amount of withdrawal liability from the plan on the date of withdrawal, and owing this sum plus interest under the schedule set per §1399(c)(1)(A)(i). But the Plan's actuary did not start the interest in August 1981, or on the date the Plan presented its demand, or on the date the first payment came due. Instead the actuary computed interest from December 31, 1980, while Schlitz was still a contributing employer. The theory is that if the end of the last calendar year is used to compute the Plan's funding shortfall, it should be used for all purposes, including interest. Other courts refer to this as "pre-demand" or "gap year" interest.

By instructing plans to use the amount of unfunded vested benefits at year-end, Congress has spared actuaries the need to revalue plan assets and liabilities every time an employer withdraws during the year. Cf. 29 U.S.C. §1082(c)(9) (requiring every plan to calculate the plan's liability yearly). Sometimes the underfunding will rise between December 31 and withdrawal; sometimes it will fall; the law of large numbers evens these things out for plans (although not for particular employers). Establishing a simple rule for calculating funding shortfalls has nothing to do with interest, and the MPPAA does not imply that withdrawing employers *owe* anything as of the end of the year before they drop out. Schlitz owed $23.3 million to the Plan as of August 1981, not as of December 1980. Schlitz was not liable for a penny until it withdrew from the Plan and received a notice of liability. The MPPAA specifically authorizes assessing the withdrawing employer with interest under several circumstances, 29 U.S.C. §1399(c)(3), (c)(4), (c)(5), but says nothing about interest prior to withdrawal. Neither the word "amortize" (on which the district court's decision turned) nor any other language of the statute supports an approach that calls for pre-withdrawal interest. We join the fourth circuit in concluding that the MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises. *Borden, Inc. v. Bakery Union Pension*, 974 F.2d 528, 536

(4th Cir. 1992). To the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the December 31 calculation date and the date of actual withdrawal, we disapprove that decision. (Whether *Huber* actually holds such a thing is doubtful.)

The Plan has not argued that it is entitled to interest for the period between withdrawal in August 1981 and the commencement of the amortization schedule in January 1982. Hence there is no basis on which to question the arbitrator's decision. The district court's judgment is affirmed to the extent it holds that Schlitz's withdrawal liability must be determined according to the presumptive method and reversed to the extent it requires Schlitz to pay interest for 1981. The case is remanded with instructions to enforce the arbitrator's award in its entirety.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,

Plaintiffs, JUDGMENT IN A CIVIL CASE

v.

MILWAUKEE BREWERY WORKERS
PENSION PLAN,

Defendant. CASE NUMBER:88-C-908

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that (1) the Court affirms the arbitrator's decision to deny the Plan's motion to dismiss; (2) the Court affirms the arbitrator's finding that the Plan required unanimous consent of all employers in order to adopt the direct attribution method of calculating Schlitz's withdrawal liability; (3) the Court affirms the arbitrator's finding that ERISA law does not impose a fiduciary duty upon a Plan's members when they decide whether to change the method of calculating withdrawal liability and (4) the Court vacates the arbitrator's decision that the Plan improperly included interest for the

period between December 31, 1980 and January 1, 1982 in calculating Schlitz's payment schedule.

June 6, 1991
Date

SOFRON B. NEDILSKY
Clerk

(By Deputy Clerk)

EXHIBIT C

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOS. SCHLITZ BREWING CO. and
THE STROH BREWERY COMPANY,

Plaintiffs,

v. Case No.: 88-C-908

MILWAUKEE BREWERY WORKERS'
PENSION PLAN,

Defendant.

ORDER

On June 6, 1991, this Court issued a *Decision and Order* affirming in part and vacating in part an arbitrator's decision with respect to the parties' case. This Court, among other things, vacated the arbitrator's decision that the Plan improperly included interest pursuant to 29 U.S.C. § 1399(c)(1) for the period between December 31, 1980 and January 1, 1982 in calculating Schlitz's payment schedule.

Now before the Court is the Plan's Motion to Amend Judgment. In this motion, the Plan requests this Court: (1) either to include a money judgment against Schlitz for interest for the year 1981 or to specify a mechanism to be followed to determine such amount and (2) to award pre-judgment interest on that amount at an appropriate rate.

I. AMENDMENT OF JUDGMENT TO INCLUDE A MONEY AWARD FOR INTEREST FOR THE YEAR 1981

The judgment entered in this matter on June 6, 1991 pursuant to this Court's *Decision and Order* does not specify the amount of interest for the period between December 31, 1980 and January 1, 1982. Accordingly, the Plan requests this Court to order the amendment of the judgment either to include a money judgment against Schlitz for interest for the year 1981 or to specify a mechanism to be followed to determine such amount. While reserving its right to appeal this Court's partial vacating of the arbitrator's decision, Schlitz states that it has no objection to an amendment of the judgment to include a specific amount for interest for the year 1981. Schlitz notes, however, that the Plan's motion does not identify the amount sought or an appropriate payment schedule. Schlitz states that it is prepared to work with the Plan to arrive at an appropriate figure consistent with this Court's *Decision and Order*. Accordingly, Schlitz requests that the Court establish a schedule which provides the parties and their actuaries with an opportunity to resolve the 1981 interest issue. Schlitz states that if the parties fail to resolve the issue within the prescribed period, they should be directed to submit the issue to the Court for final resolution. The Plan concurs that it would be appropriate for this Court to establish a schedule for the parties and their actuaries to attempt to resolve this issue and that if they are unable to reach an agreement that the matter should be submitted to the Court for final resolution.

At oral argument, the Plan's counsel requested that this Court set a short schedule of seven to ten days for the parties' actuaries to attempt to resolve this matter. In response, Schlitz' counsel stated that a period of thirty days is necessary. This Court is not expert in the area of actuarial accounting. However, it believes that a period of twenty days should be sufficient for the parties' actuaries

to meet and should address the Plan's desire for a quick resolution of this matter.

II. PREJUDGMENT INTEREST

The Plan seeks prejudgment interest from July 7, 1988, the date of the arbitrator's decision, on Schlitz' obligation to pay interest for the year 1981. In addressing the Plan's request, this Court must determine: (1) if an award of prejudgment interest is appropriate and (2) if so, what the rate of prejudgment interest should be.

A. Whether Prejudgment Interest is Appropriate

The Plan argues that an award of prejudgment interest is appropriate under Seventh Circuit case law. The Plan cites *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 629 (7th Cir. 1991). The *Rivera* court stated:

> The award of prejudgment interest for a federal law violation is governed by federal common law. The Supreme Court has held that "[p]rejudgment interest is an element of complete compensation." *West Virginia v. United States*, 479 U.S. 305, 310-11, 107 S.Ct. 702, 706-07, 93 L.Ed.2d 639 (1987); *see also General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56, 103 S.Ct. 2058, 2062-63, 76 L.Ed.2d 211 (1983). The growing recognition of the time value of money has led this court to rule that "prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay."

Id. at 696 (7th Cir. citations omitted). The Plan argues that an award of prejudgment interest is particularly appropriate in this case because: (1) the Plan has lost the use of the 1981 interest since July 7, 1988 because of the arbitrator's award; (2) Schlitz has been unjustly enriched

with the use of the 1981 interest since July 7, 1988 because of the arbitrator's decision; and (3) the 1981 interest is a fixed and determinable sum.

In response, Schlitz states that an award of prejudgment interest is inappropriate for two reasons: (1) because Schlitz has violated no federal law which would support an award of prejudgment interest and (2) because Congress has indicated its intent not to provide for an award of prejudgment interest in this situation.

(1) No Violation of Federal Law by Schlitz

Schlitz argues that an award of prejudgment interest under federal common law is inappropriate because it violated no federal law. *See Rivera* at 696. Schlitz notes that the *Rivera* court stated that " 'prejudgment interest should be presumptively available to *victims of federal law violations'* " *See id.* (emphasis added). Schlitz asserts, and the Plan concurs, that it timely made all withdrawal liability payments as required by the initial determination of the Plan and the final decision of the arbitrator. *See* 29 U.S.C. § 1401(d) (§ 4221(d) of ERISA). Accordingly, Schlitz argues that it has been in compliance with federal law and that, therefore, the Plan is not a victim of a federal law violation.

However, as this Court held in its June 6, 1991 *Decision and Order*, the arbitrator's decision with respect to 29 U.S.C. § 1399-(c)(1) was improper. Thus, although Schlitz complied with the requirements of § 1401(d), federal law, specifically § 1399(c)(1), was violated. Moreover, in order to ensure that the Plan is compensated to the degree it would have been if the arbitrator correctly decided the 1981 interest issue, this Court must award prejudgment interest from July 7, 1988 onward. This awarding of interest is consistent with the Supreme Court's statements in *Devex Corp.*, a case cited by the *Rivera* court. *See Devex Corp.* at 655-56, n.10 ("The traditional view, which treated

prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents 'delay damages' and should be awarded as a component of full compensation").

(2) Congress' Intent

Schlitz next argues that Congress has determined the prejudgment interest issue in this case by specifically providing for an award of such interest in certain circumstances and not in this case. In particular, Schlitz notes that at 29 U.S.C. § 1132(g)(2) (§ 502(g) of ERISA), Congress provided for the award of prejudgment interest where an employer is delinquent in making contributions to a plan. Schlitz notes that it was not delinquent since it initially complied with the determination of the Plan and later followed the arbitrator's decision.

However, as is shown in, courts have employed federal common law to award prejudgment interest even where the ERISA statute does not specifically call for it. Accordingly, the fact that Congress specifically provided for an award of prejudgment interest where an employer is delinquent under § 1401(d) does not mean that an award is inappropriate where an employer, although in compliance with § 1401(d), fails to make payments properly due under 29 U.S.C. § 1399(c)(1).

Moreover, this Court notes that the language of § 1132(g)(2) does not indicate an intention by Congress to prevent the awarding of prejudgment interest where an employer is not delinquent in his contributions. Rather, § 1132(g)(2) indicates Congress' intent to compel courts to award penalty damages where an employer is delinquent. The section requires that a "court *shall* award the plan" (1) the unpaid contributions; (2) prejudgment interest; (3) an amount equal to the greater of (a) prejudgment interest or (b) liquidated damages provided under the plan; (4) reason-

able attorney's fees and costs and (5) such other legal and equitable relief as the court deems appropriate. *See*, 29 U.S.C. § 1132(g)(2) (emphasis added). Thus, § 1132(g)(2) shows Congress' strong desire to have the courts employ prejudgment interest along with other remedies to punish and deter delinquent employers as well as to compensate plans. Here, the Court, pursuant to its discretionary authority under the federal common law, awards prejudgment interest not to punish Schlitz but merely to compensate the Plan for the lost use of money owing to it and to insure that Schlitz is not unjustly enriched. As stated above, the Supreme Court has approved the awarding of prejudgment interest for these purposes.

B. Proper Rate of Prejudgment Interest

Federal law does not provide a statutory rate for prejudgment interest. The Seventh Circuit has suggested that "district court judges use the prime rate for fixing prejudgment interest where there is no statutory interest rate." *See Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989). The *Gorenstein* court noted that the prime rate "is a readily ascertainable figure which provides a reasonable although rough estimate of the interest rate necessary to compensate plaintiffs not only for the loss of the use of their money but also for the risk of default." *See id.*

At oral argument, the Plan's counsel suggested that this Court award prejudgment interest at the rate of interest the Plan received on its investments during the relevant time period. The rate the Plan received on its investments depended upon the level of risk the Plan was willing to incur. Because this Court lacks knowledge as to the level of risk of the Plan's investments and because this risk is unrelated to the risk of Schlitz' default, the Court declines to award prejudgment interest at this rate.

In plaintiff's principal brief, it also suggests that this Court award interest at the rate set forth in 28 U.S.C. § 1961(a). Section 1961(a) fixes the postjudgment interest rate for federal cases as the rate on 52-week Treasury bills at the last auction of those bills before the judgment was entered. The rate of interest provided for in § 1961(a) is lower than the prime rate and has been rejected by the Seventh Circuit. "This rate is too low, because there is no default risk with Treasury bills." *See id.* at 437. Accordingly, this Court declines to award prejudgment interest at this rate as well.

III. SUMMARY

Under the foregoing reasoning, this Court **GRANTS IN PART** the Plan's motion to amend judgment. This Court **ORDERS** the parties to attempt to arrive at an appropriate figure for the 1981 interest amount consistent with this Court's June 6, 1981 *Decision and Order*. The parties should inform this Court in writing whether they were able to reach a resolution of the issue within twenty (20) days of the signing of this Order. If the parties have not reached agreement at this time, this Court will set a hearing date in the near future to address the issue.

This Court also **FINDS** that the Plan is entitled to prejudgment interest at the prime rate from July 7, 1988 on the 1981 interest amount.

Dated this 3rd day of June, 1992, at Milwaukee, Wisconsin.

ROBERT W. WARREN
SENIOR UNITED STATES
DISTRICT JUDGE

EXHIBIT D

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOS. SCHLITZ BREWING CO. and
THE STROH BREWERY COMPANY,

Plaintiffs,

v. Case No.: 88-C-908

MILWAUKEE BREWERY WORKERS'
PENSION PLAN,

Defendant.

ORDER

Before the Court are the parties' motions disputing the amount of prejudgment interest which should be imposed and the date on which post-judgment interest should begin to accrue. The plaintiff, Joseph Schlitz Brewing Company ("Schlitz"), withdrew from its multiemployer pension plan, the Milwaukee Brewery Workers' Pension Plan ("the Plan"), in September 1981. Pursuant to the Plan's regulations, Schlitz began paying the Plan a quarterly withdrawal liability assessment based upon a projected liability of $41,031,406. Under this schedule, quarterly payments of $986,370 would be made until the full amount was paid by

the year 2001.[1] Although Schlitz made regular payments, it contested the Plan's assessment of liability and proceeded to arbitrate this issue.

On July 7, 1988, an arbitrator determined that Schlitz was liable to the Plan in the amount of $23,300,000. At this juncture, the parties agreed to modify the payment schedule. Schlitz was required to pay $986,370 on August 1, 1988 and $880,331 on November 1, 1988, at which time its obligation would have been fulfilled. Schlitz made these payments, but no further payments. In the meantime, both the Plan and Schlitz brought motions before the Court. The Plan moved the Court to vacate and modify the arbitration award, and Schlitz requested confirmation of the arbitration award.

In an *Order* dated June 6, 1991, this Court upheld the arbitrator's decision on liability, but concluded that the dollar amount was incorrect and should have been $24,931,000. The difference of $1,631,000 accounted for interest on Schlitz's liability between December 31, 1980 and January 1, 1982, which the arbitrator had not applied previously. One year later, after the parties had briefed the issues, the Court concluded that the Plan was entitled to prejudgment interest at the prime rate from July 7, 1988.

Once the Court found that the arbitrator's decision did not take into account the 1981 interest, this payment schedule was modified by the parties. Actuaries for both parties agreed that under the modified payment schedule, Schlitz owed the Plan $106,039 as of November 1, 1988;[2]

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[1] These payments, in accordance with ERISA regulations, were to be amortized over a period of time. The Court found that the use of the word "amortization" implied that interest on the liability would be included in the payments.

[2] This amount reflects Schlitz's payment of $880,331 on this date. Because the payment should have been $986,370 under the

(continued...)

$986,370 as of February 1, 1989; $986,370 as of May 1, 1989; and $540,262 as of August 1, 1989. However, the calculation of prejudgment interest on these amounts is at issue.

Schlitz believes that the interest on these amounts should accumulate from the date that each payment became due, whereas the Plan argues that interest should accumulate on the sum of these payments from July 7, 1988. The difference between the two proposals amounts to $249,196 as of June 1, 1991. In addition, there is a dispute as to whether the judgment entered pursuant to the Court's *Order* by the Clerk of Court on June 6, 1991 is a final judgment. If so, the Plan would not be entitled to prejudgment interest after that date, and post-judgment interest would be calculated instead.

PREJUDGMENT INTEREST

In this case, the Court awarded prejudgment interest in order to "compensate the Plan for the lost use of money owing to it and to insure that Schlitz is not unjustly enriched." *Order*, June 3, 1992 at 6. To determine the amount due to the Plan, it is necessary to predict what would have occurred had the arbitrator imposed liability in an amount which included the interest from 1981. If the arbitrator had concluded that Schlitz's liability totalled $24,931,000 instead of $23,300,000, Schlitz ostensibly would have continued with its monthly payments in the amount of $986,370 until its obligations were met. This would have obviated the need for prejudgment interest, since the payment schedule, which is meant to "amortize the amount in level payments," would have taken the accrual of interest into account. 29 U.S.C. § 1399(c)(1).

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[2] (...continued)
original schedule, Schlitz owes the difference between the two, or $106,039.

The parties' actuaries have agreed that the payments, had they continued without interruption while the matter was pending before the Court, would have been as follows:

11/1/88	$986,039[3]
2/1/89	$986,370
5/1/89	$986,370
8/1/89	$540,262

Because this payment schedule was not followed, the Plan had to forego its regular payments to which it should have been entitled. However, this does not mean that the Plan should receive interest on $2,619,041 from July 7, 1988. That would not have been the result under the Plan's guidelines or under 29 U.S.C. § 1399 (c) (1). Rather, the Plan would have continued to receive quarterly payments in the amount of $986,370. These payments would have taken into account the interest that was accruing due to Schlitz's paying in installments rather than a lump sum.

Adopting the Plan's repayment schedule would result in the Plan receiving prejudgment interest on payments that technically had not become due yet. The Court finds Schlitz's calculations to be accurate and fair. By imposing prejudgment interest as of the date that the payments should have been due, the Court will be placing the Plan in the same position as it would have been had the arbitrator included the 1981 interest in his award. Therefore, the Court shall impose prejudgment interest on Schlitz's withdrawal liability as Schlitz's actuaries have calculated.

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[3] Schlitz paid $880,039 on this date in reliance upon the arbitrator's decision. Had the arbitrator decided that the interest from 1981 should have been included, however, this amount would not have satisfied Schlitz's liability, and it would have had to maintain its quarterly schedule of $986,370 payments until the debt was satisfied. Because Schlitz believed that it owed only $880,039 and paid only that amount, it owes the Plan an additional $106,039. However, the figure in this chart is $986,370, since the Court is projecting what *would have* occurred, rather than what *did* occur.

This calculation appears on Page 5 of Schlitz's memorandum, and imposes liability upon Schlitz in the amount of $3,221,371 as of June 6, 1991.

The Plan seems to believe that the fact that the Court ordered prejudgment interest as of July 7, 1988 means that the interest should accumulate on the total amount outstanding as of that date. However, this interpretation is inconsistent with both the purpose of prejudgment interest and the manner in which the parties agreed to settle the debt. Prejudgment interest is imposed to put a party where it would have been had there been no wrongful act in the first place, but should not cause a party to receive more than it would have in the absence of the wrongful act. *See Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692 (7th Cir. 1991). If the Plan was to receive interest on the remaining balance of the debt as of July 7, 1988, it would begin to accrue interest on monies that were not even owed to it on that date. Furthermore, the fact that the parties agreed that the withdrawal liability should be paid over a period of time, rather than in a lump sum, leads the Court to conclude that this regular payment schedule would have continued after the arbitrator's decision, had he decided correctly. The Plan would be able to receive interest on Schlitz's payments only after they had been paid. The July 7 date, far from being the date from which prejudgment interest should be calculated on the remainder of the debt, is merely the date after which prejudgment interest should be added to the quarterly payments once they have not been paid in a timely manner.

POST-JUDGMENT INTEREST

The next issue involves the characterization of the judgment entered by the Clerk of Court on June 6, 1991 in this case. Schlitz claims that the judgment was a final judgment regardless of its failure to designate a money amount of damages, but the Plan argues that a judgment does not become final until a money judgment has been

entered. Because it is clear from the disputes arising over the issue discussed previously that the June 6, 1991 judgment did not dispose of all of the issues in the case, the Plan contends that the judgment issued on June 6, 1991 was not final and therefore prejudgment interest, rather than post-judgment interest, should accrue up to today's *Decision and Order*. Since the rate for prejudgment interest is higher than the rate for post-judgment interest, it is logical for the Plan to advocate this theory.

The post-judgment interest statute, 28 U.S.C. § 1961, provides that "interest shall be calculated from the date of the entry of the judgment" at the treasury bill rate. The Court finds that the entry of the final judgment in this case was June 6, 1991, at which time the Court upheld the arbitrator's findings. The substance of the June 6 *Order* is intact even after today's decision, which merely clarifies the earlier *Order*.

The Plan cites to *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827 (1990) in support of its characterization of the 1991 judgment as not final. In *Kaiser,* the district court granted a directed verdict at the first trial, which was reversed by the Third Circuit Court of Appeals. At the ensuing trial, the jury found for the plaintiff, and a judgment was entered on August 22, 1979. The district court granted the defendant's motion for a retrial on the issue of damages. The jury returned its verdict on the damages trial on December 2, 1981, and the judgment was entered two days later. *Id.* at 830. The Supreme Court rejected the plaintiff's argument that post-judgment interest should be calculated from the date of the first entry of judgment, after the first trial, holding that "[w]here the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way." *Id.* at 836. *Kaiser's* holding stands in part for the principle that post-judgment interest may not be awarded on a judgment that is later reversed.

Under the facts of the current case, the Court will not issue a decision today which negates the effect of the decision issued in June of 1991. Rather, today's *Order* clarifies the scope of the judgment. Although the Plan's motion to amend the judgment was granted in part on June 3, 1992, the substance of the June 6, 1991 *Order* was not affected. The June 3, 1992 *Order* merely authorized the parties to attempt to reach an agreement on the dollar amount of 1981 interest to which the Plan was entitled and determined that the Plan was entitled to prejudgment interest after July 7, 1988. Because the June 6, 1991 *Order* still binds the parties, the Plan's reliance upon *Kaiser* is misplaced.

In a case with facts similar to those in the present case, the Sixth Circuit held that post-judgment interest should begin to run on the date of the original judgment, not the date of the modified judgment. In *United States v. Bank of Celina,* 823 F.2d 911 (6th Cir. 1986), the court remarked that in cases where the district court's judgment is modified, not reversed, by the appellate court, post-judgment interest is calculated based upon the date of the district court's judgment. It went on to state:

> The result should be no different when the district court modifies its own judgment, since the underlying rationale for the rule is that the date of the original judgment is controlling because that is when the correct award *should have been* entered. The fact that a district court's judgment was modified does not result in an entirely new judgment.

Id. at 914 (emphasis in original).

Neither party has provided the Court with any controlling law on this issue, and the Court is unable to locate any other cases which address *Bank of Celina* precisely. However, *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (1984), *cert. denied,* 494 U.S. 918 (1984)

provides that post-judgment interest should accrue from the date of the district court's original judgment when that judgment was set aside by the district court and later reinstated pursuant to the Seventh Circuit's mandate. In light of this holding, which is consistent with the Sixth Circuit's rationale, the Court finds *Bank of Celina* to be persuasive and shall adopt it.

The Plan protests that the June 6, 1991 *Order* is not final under the Federal Rules of Civil Procedure because a sum certain was not defined in it. However, the Court believes that the sum was readily ascertainable by actuaries. Indeed, the history of the case after June 6, 1991 bears out this theory. Schlitz and the Plan were able to agree on a dollar amount which signified the 1981 interest. Their disagreement on how the payments should have been structured arises, for the most part, on the Court's ambiguous language in the 1991 *Order* which declared that prejudgment interest would be applied from July 7, 1988; the *Order* should have provided that prejudgment interest would be applied to each monthly payment after July 7, 1988 as of its due date.

The Court finds that the substantive issues in this case were resolved by the June 6, 1991 *Order*, and that the final judgment was entered that same day by the Clerk of Court. The motion resolved on June 3, 1992 can be characterized as a "post-judgment motion" and was brought by the Plan as a motion to amend judgment pursuant to Federal Rule of Civil Procedure 59. The pendency of a post-judgment motion will not stop post-judgment interest from accruing on the underlying judgment. *Fishman v. Estate of Wirtz*, 609 F.Supp. 982 (N.D.Ill. 1985), aff'd in part, rev'd in part, and vacated in part on other grounds, 807 F.2d 520 (7th

Cir. 1986).[4] Therefore, the Court finds that post-judgment interest in this matter should be imposed after June 6, 1991.

For the reasons set forth herein, the Court hereby **ORDERS** that:

1) prejudgment interest shall accrue upon Schlitz's overdue payments as of the date each payment became due, for all payments owing after July 7, 1988; and

2) the *Order* issued on June 6, 1991 is a final order, and post-judgment interest should begin to accrue after that date.

SO ORDERED this 20th day of October, 1992, at Milwaukee, Wisconsin.

ROBERT W. WARREN
SENIOR UNITED STATES
DISTRICT JUDGE

[4] The district court in *Fishman*, faced with the identical issue concerning the imposition of post-judgment interest, appears at first glance to have taken a position contrary to the one taken by this Court today. In *Fishman*, the court entered findings of fact and conclusions of law on June 28, 1984, and a judgment was entered based upon these findings on November 21, 1984. The court refused to apply post-judgment interest from June 28 and ruled that the final judgment was entered on November 21 based upon the fact that money damages were not readily ascertainable from the previous decision. However, the result is actually consistent with the Court's ruling today. A damages award was entered on November 21, 1984 which was based upon the district court's previous findings. These proceedings can be accurately analogized to the Court's 1991 *Order* which was based upon the arbitrator's previous decision. The opinion published at 609 F.Supp. 982 stems from Rule 59 motions, which were obviously filed after the November 21 judgment. The district court's refusal to toll the accrual of post-judgment interest during the pendency of the motions creates the identical result as this Court's imposition of postjudgment interest on June 6, 1991 rather than today.

EXHIBIT E

EXHIBIT A

OPINION AND AWARD
INTRODUCTION

This is a multiemployer pension plan withdrawal liability case which began in 1981. One might ask now it comes to be that a withdrawal liability case which began in 1981 is being decided by an Arbitrator in 1988. A brief explanation is in order.

The Jos. Schlitz Brewing Company (Schlitz) withdrew from the Milwaukee Brewery Workers' Pension Plan (Plan) in September of 1981. By a letter dated September 29, 1981, the Plan demanded withdrawal liability payment from Schlitz in the amount of $41,031,406. A payment schedule was attached, requiring a first payment on November 1, 1981. On March 19, 1982, Schlitz demanded that the Plan arbitrate with Schlitz to determine Schlitz's withdrawal liability and, on that same day, Schlitz filed a suit in the United States District Court for the Eastern District of Wisconsin against the Pension Benefit Guaranty Corporation (PBGC); the Plan; the Joint Committee of the Plan and the individual members of the Joint Committee in relation to Schlitz's withdrawal liability. On December 28, 1984, two years and eight months after the suit was filed, Judge Robert W. Warren, U.S. District Judge, dismissed Schlitz's complaint.

On April 5, 1985, Schlitz and the Plan mutually agreed to appoint the undersigned as sole Arbitrator in the withdrawal liability dispute and the undersigned accepted the appointment.

Following a pre-arbitration conference, the Plan filed with the Arbitrator two Motions and a Request For Ruling. On November 7, 1985, the Arbitrator held a Hearing for the purpose of hearing and deciding the two Motions and Request For Ruling. The Arbitrator ruled on these Motions

and the Request For Ruling in a written Decision mailed to the parties on November 21, 1985.

During 1986, it appears that the parties were deposing witnesses and preparing for the Arbitration Hearing. The Arbitration Hearing took place in Milwaukee, Wisconsin for five (5) days between August 10, 1987 and August 14, 1987. This was followed by two and one-half (2½) days of additional Hearing in Romulus, Michigan from September 29, 1987 through October 1, 1987.

Following the Hearings, the Plan and Schlitz submitted Post-Arbitration Briefs and Post-Arbitration Reply Briefs. In addition, the Plan and Schlitz were engaged, with their Actuaries, in working out certain calculations which had been requested of them by the Arbitrator. These calculations were received by the Arbitrator on April 20, 1988.

The foregoing history explains the passage of time between 1981 and 1988.

This Arbitration has produced an enormous volume of reading. There were 1,000 pages of Transcripts, Pre and Post Arbitration and Reply Briefs, Appendices and boxes of Exhibits. To keep this Opinion and Award to a reasonable length, the Arbitrator has decided to make is as succinct as possible. Sparing use has been made of references and citations to other cases.

STATEMENT OF FACTS

The following Statement of Facts was stipulated by the attorneys for the Plan and Schlitz.

The Parties

1. The Jos. Schlitz Brewing Company (hereinafter referred to as "Schlitz") was at all times material hereto a

Wisconsin corporation with its principal place of business located in Milwaukee, Wisconsin.

2. The Milwaukee Brewers' Association (hereinafter referred to as the "Association") was at all times material hereto a voluntary association of breweries which were engaged in, among other things, the production and sale of beer.

3. The Miller Brewing Co. (hereinafter referred to as "Miller") is a corporation with its principal place of business located in Milwaukee, Wisconsin.

4. The Pabst Brewing Co. (hereinafter referred to as "Pabst") is a corporation with its principal place of business located in Milwaukee, Wisconsin.

5. Brewery Workers' Local Union No. 9, D.A.L.U. (now U.A.W.), A.F.L.-C.I.O. (hereinafter referred to as "Local 9"), was at all times material hereto the labor organization which represented the Milwaukee brewery workers.

6. The Milwaukee Brewery Workers' Pension Plan (hereinafter referred to as the "Plan") is a multiemployer, defined benefit pension plan, with its principal office in Milwaukee, Wisconsin. The Plan was established March 1, 1954, by an agreement dated August 16, 1954 between Local 9 and the participating employers.

THE ASSOCIATION

7. The Association was formed to prepare for and negotiate collective bargaining agreements with various labor organizations, including Local 9.

8. The Association was organized as follows: The chief executive officers of the participating breweries were on the Proprietors' Committee. The Proprietors' Committee appointed the Chairman and membership of the Labor Committee. The Labor Committee was charged with the

task of preparing for and negotiating collective bargaining agreements with various labor organizations, including Local 9.

9. On October 28, 1958, the participating members of the Association agreed to a defined set of principles, rules and procedures (hereinafter referred to as the "Association Agreement"). The members of the Association at the time were the Blatz Brewing Co., A. Gettelman Brewing Co., Independent Milwaukee Brewery, Miller, Pabst and Schlitz.

10. The Association Agreement, which contains no expiration date, was renewed from year to year and governed the conduct of the participating members of the Association.

11. The Association Agreement contained eleven basic commitments, including the following:

> All decisions and action taken by the Proprietors' Committee and by the Labor Committee shall be by unanimous vote of the respective committee, with each brewery having a reasonable opportunity to cast its vote on the question.

12. The Association Agreement also established the negotiating procedures which governed the conduct of the Association's Labor Committee. Those procedures included the following:

> (1) All questions before the Labor Committee must be decided by unanimous vote of the members present. Every member shall be given adequate notice of all meetings.
>
> (2) No bargaining proposal shall be made or accepted without prior unanimous consent of Labor Committee members.
>
> (3) Any Labor Committee member may dissent, thereby requiring referral to the Proprietors' Committee; every effort shall be made to resolve

> disagreements, and refer to the Proprietors' Committee only such matters as might involve major policy.

THE PLAN

13. The Plan was established and is maintained pursuant to successive collective bargaining agreements between Local 9, and certain brewing companies.

14. As of January 1, 1981, the Plan had three employer plan sponsors and contributors: Miller, Pabst and Schlitz.

15. The brewing companies, known as the "Brewery Proprietors", bargained jointly with Local 9 until January 21, 1981, when Schlitz gave notice of its withdrawal from multiemployer bargaining. Thereafter, in the 1981 labor negotiations with Local 9, Miller and Pabst negotiated jointly and Schlitz negotiated alone.

16. The Plan could only be amended by the "mutual agreement of the Union and the Employers", as set forth in the Plan Document.

17. During the period from 1954 to 1979, the Plan was never amended without the agreement of all of the participating employers.

18. During the period from 1954 to 1979, the Plan was amended eleven times by the mutual agreement of the Union and the participating employers, effective March 1, 1954; January 1, 1956; June 1, 1959; June 1, 1964; June 1, 1967; June 1, 1969; June 1, 1971; June 1, 1973; June 1, 1975; June 1, 1977 and June 1, 1979.

19. The Plan was operated and administered by a Joint Committee consisting of members appointed by Local 9 and the participating employers. The President of Local 9, Kenneth Mueller, was also Chairman of the Joint Committee.

20. The Joint Committee was granted the power necessary for the proper administration of the Plan, as set forth in the Plan Document.

21. The Joint Committee, however, did not have the power to amend the Plan.

22. The Plan's counsel discussed the implications of MPPAA at a specially called meeting of the Joint Committee on January 16, 1981. It was decided at the meeting that Local 9 and the Employers should be contacted regarding the new law. At the Joint Committee's January 19, 1981 meeting, the Committee decided that Plan counsel should draft a letter for the Committee to send to Local 9 and the Employers notifying them of the effect of the new law.

23. At the Joint Committee's March 13, 1981 meeting, the Committee approved Plan counsel's letter for mailing to Local 9 and the Employers. The letter advises Local 9 and the Employers of the effect of MPPAA and indicates that the presumptive method of determining employer withdrawal liability will apply unless the Plan is amended.

THE 1979 CONTRACT NEGOTIATIONS BETWEEN THE ASSOCIATION AND LOCAL 9

24. The 1979 contract negotiations with Local 9 were the last negotiations that Schlitz participated in as a member of the Association. The remaining members of the Association at that time were Miller and Pabst.

25. During the course of these negotiations, a dispute arose among the members of the Association's Labor Committee regarding Local 9's wage demands.

26. The representative from Schlitz claimed that Local 9's wage demands exceeded the President's guidelines, as established by COWPS, and that no joint proposal in excess of the guidelines should be made. Miller and Pabst disagreed.

27. A Proprietors' Committee meeting was held on May 23, 1979 to resolve the disagreement. However, the chief executive officers were unable to reach agreement at the meeting.

28. This was the first time that the members of the Proprietors' Committee had been unable to work out mutually agreeable proposals to be made to Local 9.

THE 1981 CONTRACT NEGOTIATIONS BETWEEN SCHLITZ AND LOCAL 9

29. On January 21, 1981, Schlitz gave timely notice to Miller, Pabst and Local 9 of its withdrawal from the Association and joint bargaining with the Brewery Proprietors of Milwaukee, Wisconsin. Henceforth, Schlitz would negotiate separately with Local 9.

30. Notwithstanding its separate bargaining on all issues, Schlitz also gave notice on January 21, 1981, that it would maintain its representation on the Joint Committee and continue to participate in the Plan.

31. Charles Mazza was the Schlitz representative on the Joint Committee. He attended meetings of the Joint Committee until his resignation on August 14, 1981.

32. Pursuant to the 1979-1981 labor contract, on March 9, 1981, Schlitz gave timely notice to Local 9 of its desire to terminate or modify the existing agreement between the parties.

33. On March 20, 1981, Local 9 wrote to Schlitz (and Miller/Pabst) providing notice of its desire to amend the collective bargaining agreement and to reopen the Pension Agreement.

34. On April 7, 1981, Schlitz and Local 9 began separate, bargaining on all issues.

35. On May 20, 1981, Local 9 notified Miller, Pabst and Schlitz of a meeting to be held on May 22, 1981 "for the

purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan." Schlitz responded in a letter dated May 21, 1981.

36. The existing collective bargaining agreement between Schlitz and the Union expired on May 31, 1981. Schlitz and the Union negotiated to an impasse.

37. The Union went out on strike on June 1, 1981.

38. On July 31, 1981, Schlitz announced that it was permanently closing its Milwaukee plant.

39. On August 14, 1981, the Schlitz representative on the Joint Committee gave notice of his resignation from the Joint Committee.

40. On September 29, 1981, the Plan sent a letter to Schlitz demanding the payment of $41,031,406.

THE 1981 NEGOTIATIONS BETWEEN MILLER/PABST AND LOCAL 9

41. On March 20, 1981, Local 9 wrote to Miller and Pabst (Schlitz was also given the same notice) providing notice of its desire to amend the collective bargaining agreement and to reopen the pension Agreement.

42. On March 25, 1981, Miller and Pabst began joint bargaining with Local 9 with respect to revisions to the 1979-1981 agreement.

43. On May 20, 1981, the President of the Union notified Miller, Pabst and Schlitz of a meeting to be held on May 22, 1981 "for the purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan."

44. On May 22, 1981, Miller, Pabst and Local 9 met and agreed to a Memorandum of Understanding dated May 22, 1981 regarding the Plan (hereinafter referred to as the "5/22 Memorandum").

45. The 5/22 Memorandum was never proposed to Schlitz by Miller, Pabst or Local 9, nor did Schlitz and Local 9 reach any agreement with respect to the subject matter of that memorandum.

46. On May 29, 1981, Miller, Pabst and Local 9 met again and agreed to a second Memorandum of Understanding dated May 29, 1981 regarding the Plan (hereinafter referred to as the "5/29 Memorandum").

47. The 5/29 Memorandum was never proposed to Schlitz by Miller, Pabst or Local 9, nor did Schlitz and Local 9 reach any agreement with respect to the subject matter of that memorandum.

48. Prior to May 31, 1981, Local 9 reached agreement with Pabst and Miller on a new collective bargaining agreement.

THE DETERMINATION OF THE WITHDRAWAL LIABILITY OF SCHLITZ

49. The Joint Committee met on May 18, 1981, June 17, 1981 and July 17, 1981. The Joint Committee took no action with respect to the 5/22 and 5/29 Memoranda of Understanding at a those meetings.

50. On June 17, 1981, the Joint Committee terminated its legal counsel.

51. On August 17, 1981, the Joint Committee directed the Plan's actuary to calculate the withdrawal liability of Schlitz based upon the 5/22 Memorandum and the 5/29 Memorandum.

52. The actuary reported the results of his calculations to the Joint Committee on September 15, 1981.

53. On September 29, 1981, the Joint Committee sent a letter to Schlitz demanding payment of $41,031,406.

54. On October 2, 1981, Schlitz wrote to the Plan requesting information on the calculation of its withdrawal liability.

55. On October 19, 1981, the Joint Committee responded to the Schlitz letter of October 2, 1981.

56. On October 19, 1981, the Joint Committee was presented with the amendments to the Plan as drafted by counsel for the Plan.

57. On October 29, 1981, Schlitz made the first payment on its employer withdrawal liability. The payment was due on November 1, 1981. Schlitz has made all subsequent payments on a timely basis.

58. On November 6, 1981, Schlitz requested further information from the Plan.

59. On November 16, 1981, the Joint Committee responded to the Schlitz letter of November 6, 1981.

60. On December 23, 1981, Schlitz sent a letter to the Plan.

61. On March 19, 1981, Schlitz sent a letter to the Plan requesting arbitration.

PRELIMINARY ISSUES

Shortly after the appointment of the Arbitrator, the Plan submitted to the Arbitrator two Motions and a Request for Ruling. The Motions were:

1. A Motion to Dismiss the Arbitration Proceeding;
2. A Motion to Limit Issues For Arbitration [to eliminate the issue of the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) from the Arbitrator];
3. A Request for Ruling on Procedural Matter - Burden of Proof

Schlitz was given notice of these Motions and Request for Ruling and, following the submission of Briefs in support and in opposition to the Motions and Request for Ruling, a Hearing was scheduled by the Arbitrator in Romulus, Michigan for November 7, 1985.

At that time, the Arbitrator ruled on the Motions and Request for Ruling and issued his decisions in writing, which were mailed to the parties on November 21, 1985. The following material discusses the two Motions and the Request for Ruling and reports the decisions of the Arbitrator.

1. Motion to Dismiss Arbitration Proceeding

In substance, the argument of the Plan in support of this Motion was that Schlitz failed to comply with the requirements of 29 USC 1399(b)(2)(A) and, therefore, had lost its right to arbitration. 29 USC 1399(b)(2)(A) provides as follows:

> No later than 90 days after the employer receives the notice described in paragraph (1), the employer—
>
> (i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,
>
> (ii) may identify any inaccuracy in the determination of the amount and of the unfunded vested benefits allocable to the employer, and
>
> (iii) may furnish any additional relevant information to the plan sponsor.

The notice referred to above as "described in paragraph (1)" is found in 29 USC 1399(b)(l), which states as follows:

As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer—
  (i) the amount of the liability, and
  (ii) the schedule for liability payment, and
(B) demand payment in accordance with the schedule.

Admittedly, Schlitz sent a letter to the Plan on December 23, 1981. This letter met the time requirements of 29 USC 1399(b)(2)(A), but the Plan argued that the letter's contents did not comply with the terms of 29 USC 1399(b)(2)(A). The letter is as follows:

Brewery Workers' Pension Plan
2189 North 48th Street
Milwaukee, Wisconsin 53208

Attention: Katherine M. Roback, Secretary

Dear Ms. Roback:

In accordance with the procedures suggested in your letter dated December 3, 1981, we hereby request a determination by the Joint Committee of the employer withdrawal liability chargeable to Schlitz under the "presumptive method" for calculating such liability (under Section 4211(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")). We believe that the presumptive method is the only method which may correctly be applied to Schlitz under applicable law. The Joint Committee's determination of the Schlitz withdrawal liability under the presumptive method should identify any differences which may exist between the amounts of the liability as determined under the direct attribution method asserted by the Joint Committee to be applicable and the presumptive method. Therefore, we hereby specifically request from you the following:

1. A statement concerning the withdrawal liability of Schlitz under the presumptive method set forth in Section 4211(b) of ERISA and the underlying calculations.

2. The payment schedule applicable to Schlitz under the presumptive method and the underlying calculations.

3. The calculations used to determine the unfunded vested benefits of the plan for purposes of determining Schlitz's withdrawal liability, and the actuarial assumptions and methods used in connection therewith have previously been furnished to us. If any changes to those calculations would result from use of the presumptive method, then we request those calculations, as revised.

4. A statement concerning the Joint Committee's decision as to which method of calculating employer withdrawal liability applies to Schlitz and an explanation of the basis for the decision.

Very truly yours,

JOS. SCHLITZ BREWING COMPANY

(signed)
H.L. Fessler
Vice President, Labor Relations

The Arbitrator ruled on November 7, 1985 that this letter, taken together with additional facts, satisfied the requirements of 29 USC 1399(b)(2)(A). The Arbitrator so ruled because he was convinced that, first, the exchange of communications between Schlitz and the Plan, prior to December 23, 1981 (letters from Schlitz to the Plan dated October 2, 1981; November 6, 1981 and from the Plan to Schlitz dated October 19, 1981; November 16, 1981), taken

together with the letter of December 23, 1981, communicated to the Plan that there was a specific dispute between Schlitz and the Plan over the determination of the amount of Schlitz's liability, the amount of unfunded vested benefits and the schedule of payments.

Second, inasmuch as a suit between Schlitz and the Plan had been in a United States District Court prior to the appointment of the Arbitrator, the Arbitrator believed it to be appropriate that he review and consider the Decision of Judge Warren in the case. In Judge Warren's Opinion dismissing Schlitz's suit on Motion of the PBGC and the Plan, Judge Warren discussed the role of arbitration as a condition precedent to the right of Schlitz to bring suit. Judge Warren repeated the long settled rule that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed remedy has been exhausted. He repeated the several reasons which are cited as the bases of the "exhaustion doctrine".

Among the reasons are the following: (1) that the rule allows an administrative agency to use its discretion and apply its expertise to the dispute; (2) that the rule minimizes piecemeal appeals of agency actions; (3) that the administrative tribunal can make findings of fact upon which a court may later rely; (4) that the complainant's rights may be vindicated at the administrative level and (5) that the rule gives deference to the will of Congress where a Federal statute specifies that an administrative tribunal should serve as the initial forum for dispute resolution.

Judge Warren then pointed out that arbitration has been treated as equivalent to an administrative tribunal for purposes of the exhaustion doctrine.

Judge Warren concluded that, in the case before him, "it would be possible for an administrative tribunal to resolve the factual issues and develop a record that would result in judicial economy should this matter later proceed to District Court. The purposes of the exhaustion doctrine

will be served by requiring the Plaintiff to exhaust its administrative remedies before commencing an action in this Court".

The Arbitrator read Judge Warren's Opinion as directing that Schlitz take its case to arbitration. In light of Judge Warren's words, the Arbitrator believes that Judge Warren did not intend to dismiss the case before him for the purpose only of having an arbitrator decide that Schlitz was not entitled to arbitration.

It should be pointed out that, to the best of the Arbitrator's ability to discover, neither the Plan nor the PBGC, in documents and arguments presented to Judge Warren, ever asserted that Schlitz had lost its right to proceed to arbitration under 29 USC 1401.

Third, Schlitz had timely begun making its withdrawal liability payments, as demanded by the Plan, the first one, in the amount of $986,370.00, having been made on October 27, 1981. Thus, Schlitz was complying with a critical statutory requirement prior to and pending the arbitration.

The Plan, in support of its Motion to Dismiss, relied mainly on three cases. These are:

1. *Niagara Paper Corp v Pager Industry Pension Fund*, 5 EBC 1496 (D Minn, 1983)
2. *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v Thompson Building Materials, Inc*, No. CV 82-5377-DHH, U.S. District court for the Central District of California, Findings of Fact and conclusions of Law filed April 29, 1982, app. dis, aff'd 749 F2d 1395 (9th Cir. 1984)
3. *William Evans v Frito-Lay, Inc*, Case No. 83-2337, U.S. District court for the Northern District of Ohio, Opinion filed 9/06/83

In the opinion of the Arbitrator, each of these three cases is factually distinguishable from the instant case.

In *Niagara*, after receiving its notice of withdrawal liability from the plan, the employer wrote back to the plan saying it had no reason to feel that the indicated liability and the installment schedule are inappropriate. The employer then requested four items of additional information. The Court held that this letter did not meet the requirements of 29 USC 1399(b)(2)(A).

In *Thompson,* the employer, on receipt of the notice from the plan of its withdrawal liability, sent a letter to the plan protesting the liability and demanding arbitration. The plan responded by informing Thompson that his demand for arbitration was ineffective and advising Thompson of the steps to be taken to initiate arbitration. Thompson never initiated arbitration or paid any of the withdrawal liability.

Evans is the case which most solidly supports the Motion of the plan. Here the employer sent a letter to the plan which the Court characterized as merely requesting information. With this characterization, the Court tested the letter against the words of 29 USC 1399(b)(2)(A) and found that the words of the letter did not match the words of the statute. It should be pointed out, however, that in this case, the employer never began making the scheduled withdrawal payments, which were overdue when the demand for arbitration was finally made by the employer.

At the conclusion of the Arbitration Hearing, the Plan renewed its Motion for Dismissal of the arbitration. The Arbitrator now reaffirms his Decision of November 7, 1985 and denies the Plan's Motion to Dismiss the Arbitration.

2. Motion to Limit Issues for Arbitration.

The Arbitrator granted this Motion for the following reason. The issue of whether MPPAA, 29 USC 1381-1461,

is unconstitutional is clearly an issue of law and issues of law conventionally are to be decided by the courts. Therefore, the Arbitrator decided that this issue should be reserved for a court if, following the arbitration, either of the parties decides to continue litigation in this matter. The Arbitrator now reaffirms his Decision of November 7, 1985 and grants the Plan's Motion to Limit Issues for Arbitration.

3. Request for Ruling on Procedural Matter - Burden of Proof

The Plan presented the Request for ruling based upon the fact that, apparently, the issue of Burden of Proof in the arbitration remained unresolved between the Attorneys for the Plan and Schlitz as they conferred to agree upon a variety of matters related to the arbitration. Apparently, the attorneys for Schlitz desired to challenge the constitutionality of 29 USC 1401(a)(3)(A), which provides as follows:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under Sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The Arbitrator deferred a ruling on Burden of Proof with the following explanation:

The Arbitrator stated that he will comply with 29 USC 1401(a)(3)(a), as quoted above. As to any subsidiary issues which may arise during the course of the arbitration, the Arbitrator stated that he will, as a general proposition, require the party who advances an allegation or assertion to establish to the Arbitrator that the allegation or assertion has been convincingly proven.

ISSUE I

WAS THE PLAN AMENDED AS A RESULT OF THE MEMORANDA OF UNDERSTANDING OF MAY 22 AND MAY 29, 1981 BETWEEN PABST, MILLER AND LOCAL 9, SO AS TO BE APPLICABLE TO SCHLITZ AND, THEREFORE, TO VALIDLY REQUIRE THE USE OF THE DIRECT ATTRIBUTION METHOD IN THE CALCULATION OF THE WITHDRAWAL LIABILITY OF SCHLITZ?

At first blush, there seems to be a relatively simple and direct answer to the foregoing question. Article IX of the Plan specifies that: "The Plan may be modified, altered, or amended upon mutual agreement of the Union and the Employers . . ." Inasmuch as it is a stipulated fact that Schlitz did not participate in the meetings of May 22 and May 29, 1981 and never agreed to the Memoranda of Understanding dated on those two dates, it would appear that the amendments to the Plan set forth in the Memoranda of Understanding of May 22 and May 29, 1981 were not made upon the mutual agreement of the Union and the Employers. This conclusion rests upon an interpretation of the words "mutual agreement". If those words are interpreted to mean unanimous agreement, then it is clear that unanimous agreement did not occur, since Schlitz, one of the Employers, did not agree to the amendments.

Is it possible that the words "mutual agreement" have some meaning other than unanimous agreement? Conceivably, but the Arbitrator thinks not. Black's Law Dictionary (Third Edition) defines "agreement" as "the union of two or more minds in a thing done or to be done; a *mutual assent* to do a thing." Thus, the word "mutual" appears to be an inherent element of the word "agreement".

The use of the words "mutual agreement of the Union and the Employers" in the Plan, in the opinion of the Arbitrator, requires that the Union and all the Employers agree to any amendment of the Plan.

Confirmation of this interpretation is found in the fact that, in the history of this Plan, all amendments prior to those made on May 22 and May 29, 1981 were made by the unanimous agreement between all the Employers and the Union.

It follows, then, that if the Memoranda of May 22 and May 29, 1981, by which the direct attribution method for the calculating of withdrawal liability was adopted, are not binding on Schlitz because they were not made upon the mutual agreement of the Union and the Employers, the direct attribution method cannot be used in the calculation of the withdrawal liability of Schlitz, even though the technical date of Schlitz's withdrawal from the Plan was subsequent to May 29, 1981.

However, the Plan has attempted to meet the above suggested response to Issue I by proving that:

1. The Union and the Employers were fiduciaries of the Plan.
2. Schlitz was obligated, by reason of its fiduciary position, to attend the meetings of May 22 and May 29, 1981, at which the Plan amendments were adopted.
3. The acting fiduciaries of the Plan who met on May 22 and May 29, 1981, were required by their fiduciary responsibilities to adopt the direct attribution method of calculating withdrawal liability.
4. The direct attribution method of calculating withdrawal liability is the preferred and correct method of calculating withdrawal liability for the Plan in 1981.
5. For the foregoing reasons, the absence of an appropriate Schlitz representative or representatives from the meetings of May 22 and May 29, 1981 could not prevent the legal adoption of the direct

attribution method as the Plan's method of calculating withdrawal liability and that, therefore, Schlitz is bound to pay withdrawal liability calculated by the direct attribution method.

The Plan attempted to prove its contentions primarily through the testimony of Jeffrey Clayton, Esq. Clayton appeared as an expert witness on behalf of the Plan. Clayton is a lawyer who was the Administrator of the Office of Pension and Welfare Benefits in the United States Department of Labor from December 1981 until September 1983. Clayton is now in private practice with a law firm in Salt Lake City, Utah.

Clayton testified that, as Administrator of the Office of Pension and Welfare Benefits, he was responsible for enforcing the provisions of Title I, of ERISA. As Administrator, Clayton had the responsibility of determining whether suit should brought for alleged violations of Title I. Most of the cases he passed on involved alleged violations of the fiduciary standards set forth in ERISA. These cases involved different kinds of violations of fiduciary standards and occurred in various places in the United States.

Since his return to private practice, Clayton has specialized in ERISA work. Perhaps 70% to 80% of his present work is in this field. He has been appointed as an independent representative of plans. He has served as an independent fiduciary. He has appeared in cases as an expert witness. Be has appeared at numerous conferences and seminars, and generally his speeches deal with compliance with the fiduciary standards of ERISA.

Having been engaged as an expert witness by the Plan, Clayton had reviewed a number of documents relating to this case.

Clayton's pertinent testimony can be summarized as follows:

1. A person who retains the power to amend a plan is a fiduciary. In exercising the power to amend the Plan, as provided in Article IX of the Plan, the Union and Employer representatives would be exercising a fiduciary function. Any type of amendment of the Plan would be an exercise of fiduciary function.

2. ERISA is like a template which has been imposed on labor relations, so that what once were purely collective bargaining decisions are now fiduciary decisions.

3. Selection of the method of determining withdrawal liability under MPPAA would involve a fiduciary decision, and the representatives of the Union and Pabst and Miller were acting as fiduciaries when they adopted the Memoranda of May 22 and May 29, 1981.

4. The adoption of the direct attribution method for calculating withdrawal liability by the representatives of the Union and Pabst and Miller by the Memoranda of May 22 and May 29, 1981 was mandated by Section 404 of ERISA, because Section 404 requires the fiduciaries to act prudently solely in the interest of the Plan participants and beneficiaries.

5. This is a textbook case calling for the adoption of the direct attribution method. The Plan had good records, the industry was declining, the number of employees had gradually diminished, the Plan was not in good financial shape and the direct attribution method attempts to allocate withdrawal liability to the employer which created the liability. The direct attribution method broadens the base of economic support for the plan and, therefore, is consistent with the fiduciary obligation to operate the plan in the sole and exclusive interest of the participants and beneficiaries.

6. If the representatives of Schlitz received a notice of the meeting of May 22, 1981 and knew that the meeting was called for the purpose of discussing methods of computing withdrawal liability, they would have had a fiduciary duty to attend the meeting, and if a representative of Schlitz had attended the meeting of May 22, 1981, the representative would have had a fiduciary duty to vote for the direct attribution method.

7. If Article IX of the Plan is interpreted to require unanimous consent of the Union and the Employers to amend the Plan, then the amendment process is imprudent and unenforceable.

8. In Clayton's opinion, the Memoranda of May 22 and May 29, 1981 executed by the Union, Pabst and Miller validly amended the Plan, even though Schlitz did not agree to the Amendment, and the Amendment therefore is binding on Schlitz.

DISCUSSION

To be persuaded that Clayton's opinion that the Plan was validly amended by the Memoranda of May 22 and May 29, 1981, the Arbitrator believes that support for the opinion should be found, if possible, in ERISA or in judicial decisions. Looking first at ERISA, the Arbitrator finds a definition of a fiduciary in Section (21)(A), 29 USC 1002(21)(A), which is as follows:

> 21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of

> such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

This language is noteworthy in that it seems focused on administration of plans. The language of the statute refers to discretionary authority, discretionary control, management or disposition of assets and investment advice. The creators of the Plan seem to have given to the Joint Committee of the Plan functions which easily fit within the definition of fiduciary as found in Section (21)(A) of ERISA. 29 USC 1002(21)(A). (See Plan, Article XII.) But the Joint Committee was not empowered to amend the Plan.

In its Briefs, the Plan vigorously argued that the so-called "primary decision makers" were also fiduciaries of the Plan under ERISA. The "primary decision makers, as so characterized by the Plan, were the Union and the Employers. The theory of the Plan is that these "primary decision makers" assumed and retained authority and control over the Plan's management and administration. The Arbitrator declines to accept this interpretation of the facts. As the Arbitrator sees it, the Union and the Employers created the Plan. They reserved the power to amend the Plan to themselves. Otherwise, they turned the administration of the Plan over to the Joint Committee. (See Plan, Article XII.) The reservation of the power to amend the Plan was a reservation of a collective bargaining power. The Arbitrator rejects the characterization of the Union and the Employers as fiduciaries.

Unquestionably, representatives of the Union and the Employers who were appointed by the Union and the Employers with authority to take specific actions could be fiduciaries if the actions in question involved the administration of the Plan or handling its assets. This is consistent with the testimony of Clayton, who testified that whether a person is a fiduciary is to be determined by the specific

facts surrounding the action in question. Nor can the fact that a Union or Employer representative is a fiduciary as to a particular act or function endow him with authority and power to perform an act reserved by his principal to the principal itself.

The many cases which were cited by the Plan in its Briefs in support of its claim than Schlitz was a fiduciary and, therefore, assertedly required to attend meetings called to amend the Plan and assertedly required to vote to amend the Plan are not apposite. They are cases in which individuals who were either employer or union representatives engaged in plan functions or administration, or dealt with plan assets, and were therefore deemed to be fiduciaries with respect to the acts in question.

In *United Independent Flight Officers, Inc. v United Air Lines, Inc & Air Line Pilots Ass'n, Int'l*, 756 F2d 1267, 1268 (7th Cir. 1985) the Court said:

> (2) To impose fiduciary status on negotiators would unreasonably cramp legitimate negotiations, presumably forcing negotiators to arbitrarily favor a single group of employees. The concept of negotiator as fiduciary is also wholly inconsistent with the very fiduciary provisions of ERISA, which were designed to prevent a fiduciary "from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." Amax Coal, 453 U.S. at 334, 101 S.Ct at 2796 (quoting S.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 309, reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5089). *We conclude that a union is not a fiduciary while, or merely because, it is negotiating the terms and conditions of future pension benefits, at least where these benefits are not protected under ERISA's vesting and nonforfeitability provisions.* (Emphasis added).

The Arbitrator believes that the legal conclusions contained in the testimony of Clayton, previously set forth, are overstated. It is understandable that an attorney given Clayton's responsibilities in the Department of Labor in the developmental period of 1981-1983 might have an expansive view of the law he was hired to interpret and enforce. The Arbitrator is convinced that accommodation must exist between the massive body of law relating to the process of collective bargaining and the relatively new requirements of ERISA. The legal conclusions of Clayton in effect would result in ERISA wholly swallowing up the process of collective bargaining as it relates to pension plans. (See also, Fillion and Trevilcock, *The Duty To Bargain Under ERISA*, 17 Wm & Mary LR 251 [1975].)

It is now accepted beyond argument that pensions are a mandatory subject of bargaining between Unions and employers. The Plan was created by collective bargaining. The collective bargaining agreement in effect from June 1, 1979 through June 1, 1981, in Article VII, 8, provides as follows:

> 8. The Milwaukee Brewery Workers' Pension Plan shall be maintained in full force and effect until June 1, 1981. In the event that either party to this contract notifies the other in writing not less than sixty (60) days prior to June 1, 1981, of its desire to terminate or modify such Plan, then the parties shall meet to study and negotiate necessary revisions.

It is to be noted that the collective bargaining commitment was only to maintain the Plan until June 1, 1981. For any period after that date, either the Union or the Employers were free to propose changes including, conceivably, the termination of the Plan. It was further stipulated that Schlitz timely and properly withdrew from joint bargaining with Pabst and Miller, and that on April 7, 1981, Schlitz and Local 9 began separate bargaining on all issues.

Clayton conceded that the letter from the Union to Schlitz dated May 20, 1981, announcing a meeting to negotiate changes in the Plan, was not adequately informative. Further, Schlitz responded to the letter of May 20, 1981 with a letter dated May 21, 1981 stating that because Schlitz was aware that a letter identical to that received by Schlitz under date of May 20, 1981 had been sent to Pabst and Miller, Schlitz would not bargain jointly with the other Employers. This letter requested an answer from the Union if the meeting of May 22, 1981 was intended for any purpose other than joint bargaining. No response to this letter was received by Schlitz, and Clayton also conceded that, under this state of facts, it is unclear whether Schlitz was ever properly notified of a meeting to be held on May 22, 1981 which it might have been obligated to attend.

Therefore, taking into account the language on amendments to the Plan; (2) the inclusion in the collective bargaining agreement of reference to the steps to be taken to amend (modify) the Plan; (3) the stipulation that the Joint Committee was not empowered to amend the Plan; (4) the accepted interpretation of the National Labor Relations Act that pensions are a subject of mandatory bargaining; (5) judicial decisions which support the proposition that when unions and employers bargain about pensions, they are not acting as fiduciaries but rather as collective bargaining parties; and (6) that the Union's notice to Schlitz of its desire to bargain a change in the Plan was unclear and that Schlitz refused to attend the meeting of May 22, 1981 because it desired to follow a consistent line on separate bargaining, the Arbitrator concludes that Clayton's testimony is not persuasive of his opinions.

As to Clayton's reference to ERISA being like a template laid down over collective bargaining about pensions, giving the bargainers no freedom to ignore the requirements of ERISA, the Arbitrator agrees that on many matters the analogy of a template is appropriate. *However, there is a clear distinction between those provisions of*

ERISA which require certain pension plan decisions or which prohibit certain activities by plans or their fiduciaries and those provisions of ERISA which are permissive. For example, where ERISA requires a minimum vesting schedule, a pension plan subject to ERISA cannot adopt or maintain a vesting schedule which violates the minimum schedule established by ERISA. On the other hand, ERISA (MPPAA) does not mandate the adoption of a direct attribution method of calculating withdrawal liability. If the parties who have the power to amend a plan desire to adopt the direct attribution method, they may do so. If they do not, then the statutorily prescribed presumptive method applies.

It can be argued that, in the case of the Milwaukee Brewery Workers' Pension Plan, the direct attribution method of calculating withdrawal liability is a better method than the presumptive method. However, the decision to adopt a method is a decision to be made by those parties to a multiemployer pension plan who have the authority and power to amend the plan. In this case, the power and authority to amend the Plan resided in the hands of the three Employers and the Union. Schlitz never concurred in the amendment which was adopted on May 22, 1981 and readopted in a refined form on May 29, 1981. Therefore, as to Schlitz, the only method under MPPAA which can be used to calculate the withdrawal liability is the presumptive method.

Clayton made much of the fact that by not attending the meeting of May 22, 1981, and by not agreeing to the amendment changing the method of calculating withdrawal liability, Schlitz was defying the wishes of the other three parties to the Plan. That seems to be the fact. However, the Union and Pabst and Miller cannot overcome the refusal of Schlitz to agree to an amendment to the Plan by simply adopting the amendment themselves.

The Plan cited the case of *Burud v Acme Electric Co, Inc,* 5 EBC 1793 (DC Alaska 1984) as authority for the proposition that a majority of the trustees may act to bind a trust. This case, it is argued by the Plan, supports the action of the Union, Miller and Pabst in amending the Plan. In the Arbitrator's opinion, the facts of the *Burud* case are so clearly different from the facts of the instant Arbitration as to make the case not applicable. In the *Burud* case, the trustees were clearly trustees of a trust. In the instant case the Arbitrator has decided that, with respect to the amending of the Plan, the Union and the Employers were not fiduciaries (trustees) but collective bargaining parties.

Accordingly, the Arbitrator finds that the amendment to the Milwaukee Brewery Workers' Pension Plan adopted by the Memoranda of May 22 and May 29, 1981 is not operative with respect to Schlitz, and that the correct legal and statutory method for calculating Schlitz's withdrawal liability is the presumptive method as set forth at 29 USC 1391(b), and that the decision of the Plan to assess the withdrawal liability of Schlitz on the basis of the direct attribution method is clearly erroneous.

II

WHETHER THE INTEREST ASSUMPTION ADOPTED BY THE PLAN'S ACTUARY AND USED IN THE DETERMINATION OF THE WITHDRAWAL LIABILITY OF SCHLITZ WAS "REASONABLE (TAKING INTO ACCOUNT THE EXPERIENCE OF THE PLAN AND REASONABLE EXPECTATIONS) AND WHICH, IN COMBINATION, OFFER THE ACTUARY'S BEST ESTIMATE OF ANTICIPATED EXPERIENCE UNDER THE PLAN?" 29 USC 1393.

The Plan's Actuary, in calculating the withdrawal liability of Schlitz, adopted an interest assumption of 7%. Schlitz attacked this assumption as not in compliance with 29 USC 1393.

Under 29 USC 1391, the calculation of Schlitz's withdrawal liability was to have been made as of December 31, 1980, which was the last day of the plan year immediately preceding the year of withdrawal. Schlitz withdrew from the Plan in September 1981. The ongoing interest assumption of the Plan in 1980 was 7%

The Plan's Actuary, William Farquhar, testified at length during the Arbitration Hearing. Farquhar is a consulting actuary who was employed by Meidinger Associates, Inc. in Meidinger's Chicago office between 1978 and 1983. Farquhar was the enrolled actuary for the Plan. He supervised and reviewed the preparation of the valuation reports and certified the Schedule B for the Form 5500 filed with the Internal Revenue Service. Farquhar prepared the determination of Schlitz's withdrawal liability.

Farquhar, on leaving Meidinger in August of 1983, took employment with Connecticut General Life Insurance Company (now known as CIGNA). He is currently Assistant Vice President and Consulting Actuary in the group pension division. He serves as consulting actuary and enrolled actuary, servicing 35 to 40 plans.

Farquhar defended the use of the 7% interest assumption in calculating the Schlitz withdrawal liability on several grounds. First, he pointed out that in a revised actuarial report made in December 1980 the ongoing interest assumption was raised from 5% to 7%. This was done to recognize the higher investment return expected. Second, he believed that most actuaries were using the ongoing interest assumption in calculating withdrawal liability in multiemployer plans. Third, the Memorandum of May 29, 1981, which represented the decision of Miller, Pabst and the Union, directed him to use the 7% assumption.

To contest the reasonableness of the 7% interest assumption, Schlitz presented an expert witness, Joseph A. LoCicero. LoCicero is currently employed at Buck Consul-

tants. His position is Benefit consultant and Director of Multiemployer Services. He is a Director of the firm and Secretary of the corporation. LoCicero is an Enrolled Actuary and Attorney. He is Director of Buck's Multiemployer Consulting Unit and provides consulting services to boards of trustees and to employers who participate in multiemployer plans. This includes reviewing withdrawal liability assessments.

In preparation for his testimony in this arbitration, LoCicero reviewed all the documentation relating to the calculation of the withdrawal liability assessed against Schlitz, including the various actuarial exhibits and employee data used by Farquhar to prepare his calculation.

LoCicero's testimony was lengthy and thorough. The initial portion of his testimony was devoted to an explanation of how withdrawal liability is calculated and the factors which an actuary must take into account in making the calculations. Specifically, on the subject of the interest rate assumption, LoCicero took exception to the use of the identical interest rate for the calculation of the withdrawal liability as the actuary used for the ongoing Plan.

LoCicero brought out the different elements and factors which must be considered in calculating withdrawal liability as against those which must be considered in calculating ongoing benefits for all participants in the future. He adverted to the shorter payout period which is involved in withdrawal cases and the fact that rates of return on the assets on hand can be more confidently anticipated than the long term rates of return which must be estimated for ongoing plan calculations.

In substance, LoCicero testified that he believes that the use of the ongoing Plan interest assumption is improper and unreasonable when applied to the calculation of withdrawal liability.

LoCicero testified from exhibits showing that actuaries,

when calculating withdrawal liability, have used rates of interest which are higher than the ongoing plan rate. In particular, LoCicero advocated the use of interest rates as set and published by the PBGC on December 31, 1980 or January 1, 1981 which exceeded the 7%, used by Farquhar. Or, in the alternative, he advocated the use of a "blended" rate, as devised by the Martin E. Segal Company (Segal Co.).

The Plan also presented an expert witness on the subject of the interest rate assumption. He was Thomas D. Levy. Levy is a Consulting Actuary. He has been employed by the Martin E. Segal Company since 1968. After several management and actuarial positions with Segal Co., Levy was placed in charge of the actuarial operations of the company in Washington, D.C. and Atlanta. In February of 1988 he was named Chief Actuary of the company. He is also a Senior Vice President and a member of the Management Committee.

Segal Co. has as its clients probably the largest number of multiemployer pension plans that any actuarial firm has in the United States. Segal Co. has developed a "blended" rate which it uses in calculating withdrawal liability. The blended rate is, in substance, a combination of the ongoing interest rate and PBGC rates. The blending, as performed by Segal Co., reflects the relationship between the unfunded vested benefits and the assets which a plan has on hand at the time that an employer withdraws.

Testimony and exhibits were introduced which showed that the Segal Co. blended rate in December 1980 was 7.5%. Levy explained, however, that this blended rate was arrived at by using an ongoing plan rate of 6%, combined with PBGC rates. Therefore, according to Levy, it was not applicable to this case because the ongoing interest assumption used by Farquhar was 7%. Levy testified that in his opinion the use of a 7% interest rate in the calculating of the Schlitz withdrawal liability was a reasonable judgment.

DISCUSSION

The matter of the appropriate interest rate to be used has been an issue in almost every withdrawal case of which there is a record. Numerous actuaries have given their varying opinions in both court cases and arbitrations. The subject has been discussed in many publications. There is no uniformity of opinion. Apparently, the decision on what rate is to be used is a discrete judgment based on a variety of factors which each actuary values in his own way. Accordingly, it is perhaps less difficult for an arbitrator or a judge to discern when an unreasonable rate has been used than to determine a reasonable rate.

The ongoing funding rate is commonly used in calculating withdrawal liability. At least two reasons are frequently given for this fact.

1. It is in the best interest of the plan to use a consistent interest rate to preclude controversy and to assess withdrawal liability in concert with historic plan funding policy;

2. The ongoing interest rate assumption is in keeping with what the fund has been earning and can be defended. It is simple, consistent and has been upheld in court cases.

(See Feuer, "The Selection and Arbitration of Withdrawal Liability Interest Rates", *Employee Benefits Journal,* Volume 10, Number 1, March 1985, p 23.)

The Arbitrator has carefully weighed the testimony of Farquhar, LoCicero and Levy and believes that, on the basis of the evidence presented, as of December 31, 1980, a 7% interest rate assumption for the purpose of calculating withdrawal liability was reasonable within the meaning of 29 USC 1393. That is not to say that an interest rate assumption of 7.5% would have been unreasonable. Unfortunately, there is no way of determining exactly what a reasonable rate is. And, more to the point, MPPAA re-

quires that the Arbitrator set aside the plan's interest rate assumption only if he finds it to be unreasonable. That this Arbitrator cannot conclude in this case. Therefore, the Arbitrator finds that the 7% interest rate assumption used by the Plan in calculating the Schlitz withdrawal liability was reasonable and, accordingly, the Arbitrator sustains the use of this interest rate.

ISSUE III

WAS THE RETIREMENT AGE ASSUMPTION (PENSION COMMENCEMENT DATE) WHICH WAS USED BY FARQUHAR "REASONABLE (TAKING INTO ACCOUNT THE EXPERIENCES OF THE PLAN AND REASONABLE EXPECTATIONS) AND WHICH, IN COMBINATION, OFFER THE ACTUARY'S BEST ESTIMATE OF ANTICIPATED EXPERIENCE UNDER THE PLAN"? 29 USC 1393.

The Plan and Schlitz agree that the calculation of Schlitz's withdrawal liability in this case must be made as of December 31, 1980. For the purpose of the retirement age assumption, Farquhar, the Plan actuary, assumed that all Plan participants who were eligible for early retirement (age 55 plus 10 years of service) would take their retirement on January 1, 1981 or as soon thereafter as they became eligible. Schlitz challenged this assumption as unreasonable.

Farquhar testified that he adopted the retirement age assumption which he used because he was of the opinion that all Schlitz employees who were eligible for early retirement or normal retirement would immediately retire on the closing of the Schlitz Brewery. Farquhar said he believed that the Union brewery workers employed by Schlitz would not be able to readily find employment in the brewing industry in Milwaukee upon the closing of the Schlitz plant. Having been informed that the brewing industry was in a declining state in Milwaukee in 1980 and 1981, Farquhar stated that he did not believe that the

remaining two breweries could absorb the terminated Schlitz employees.

Farquhar testified further that the Plan provides excellent monetary inducements and benefits for early retirement. Thus, those participants who are 55 years of age or older can retire with enhanced benefits from the Plan and look for other employment outside the brewing industry and still draw their pensions.

However, it is to be noted that this same assumption was adopted by Farquhar for the employees of Miller and Pabst. When Farquhar was questioned as to why he had made the same retirement assumption for the Miller and Pabst employees when he had no reason to believe that the Miller or Pabst Breweries were about to terminate operations, Farquhar's answer was that actuarial principles related to the direct attribution method required him to use the same assumption for all participants. Farquhar acknowledged that he had no reason to assume that the Miller or Pabst breweries would close down. However, he stated that in view of the fact that, as of December 31, 1980, he could not know what events or terminations would take place in 1981, he was obliged to make one assumption for all participants which would operate correctly, under actuarial principles, whether one or more breweries shut down in 1981. Farquhar acknowledged that his retirement assumption was "case specific". This acknowledgment was confirmed by a Plan Exhibit (157) which showed that almost all eligible Schlitz employees took retirement promptly after the Schlitz Brewery was closed.

The Arbitrator questioned the two expert actuarial witnesses, Levy and LoCicero, about Farquhar's retirement assumption. Levy stated that the only appropriate retirement age assumption which Farquhar could make, as of December 31, 1980, was the assumption Farquhar used. Levy testified that this was the only assumption which could be contemplated by Farquhar, even though at the

time the withdrawal calculations were made, in September 1981, Farquhar knew that, in fact, only Schlitz, of the three breweries, had closed its plant, and the other two breweries were continuing to produce beer and employ Plan participants. Levy said that this was the classically correct actuarial retirement age assumption to be made, based upon the use of the direct attribution method.

When the Arbitrator questioned Levy further, Levy indicated that he was not sure whether the retirement assumption used by Farquhar would be a reasonable and actuarially correct assumption if the presumptive method of calculating withdrawal liability was used instead of the direct attribution method. He said, "I'm not sure whether I come to the same conclusion under the presumptive method." (Tr. p 821)

The Arbitrator then asked Levy: "Are you saying that under the presumptive method you'd have to use the same retirement assumptions as were used here for the direct attribution?" Levy answered: "No, I'm not saying that. I'm saying they would have to be the same with respect to all employers, and I'm saying I am not as comfortable with the one that was used here in the situation of a presumptive method calculation as I am in the direct attribution." The Arbitrator then asked Levy, "How would you do it if it were the presumptive method?" Levy answered, "I'd have to do a lot of hard thinking about the retirement age assumption in that set of circumstances . . ." (Tr. pp 823, 824)

LoCicero also agreed that the retirement age assumption was required to be made as of December 31, 1980, but LoCicero stated that it was incorrect to assume, as Farquhar did, that all participants 55 years of age or older, with 10 years of service or more, would retire in 1981. LoCicero said that Farquhar had used an assumption which was "case specific", because it really rested on Farquhar's belief that all eligible Schlitz employees would take retirement as soon as possible after the Schlitz Brewery closed.

LoCicero asserted that in making the retirement age assumption, the actuary should avoid being case specific.

In his testimony, LoCicero proposed another retirement age assumption, which he called "select and ultimate". Under this assumption, the actuary would assume that, for 1981, all participants eligible for early retirement or normal retirement would take their retirement, but beginning in 1982 the Plan's ongoing retirement age assumption would be used. The result of this assumption was that 35% of the participants were treated as taking retirement in 1981. The balance were assumed to take their retirement according to the schedule in the Revised Actuarial Report of December 1980. The difficulty with this testimony, however, was that LoCicero acknowledged that he knew of no plan which had adopted a select and ultimate assumption in a withdrawal liability case. LoCicero stated that a select and ultimate assumption has been used with respect to turnover projections and has been used with respect to interest rates, and that it may be a unique approach for this special case with respect to retirement assumptions. But he also stated that he did not recall ever seeing it used in a case involving withdrawal liability, and he stated that he does not believe in this method because it is a case specific method.

DISCUSSION

To the Arbitrator, the testimony of the actuaries on the issue of retirement age assumption was incomplete and selfcontradictory. The three actuaries agreed that the retirement age assumption was to have been made as of December 31, 1980. However, it seems clear that Farquhar could not have known on December 31, 1980 of the Schlitz withdrawal. It seems equally clear that when Farquhar made his withdrawal calculations in September of 1981, he was aware of the Schlitz withdrawal and based his assumption on retirements which he expected would flow from the

closing of the Schlitz Brewery on July 31, 1981. But he used a single assumption for all participants without any reason to believe that the pension commencement dates for Miller and Pabst employees would be the same as for Schlitz employees. Farquhar defended his assumption by the assertion that he is required to use a single assumption for all participants and Employers, and that the assumption he used was reasonable under the direct attribution method, which he was directed to use.

Levy agreed with Farquhar's retirement age assumption. LoCicero criticized Farquhar's assumption as being case specific. But LoCicero's proposed assumption is also case specific. It reaches substantially the same result as Farquhar's assumption with respect to the Schlitz employees, but shifts back to the retirement assumptions in the Revised Actuarial Report of December 1980 for the Miller and Pabst employees who would not be expected to take retirement in 1981. Is the "select and ultimate" one retirement assumption or two? Is it one assumption for 1981 and a second assumption for 1982 and thereafter? Further, LoCicero did not recommend it because it is case specific and has not been accepted by the actuarial profession for withdrawal liability cases.

The testimony of the actuaries on the subject of retirement age assumption has placed the Arbitrator in the position where he does not have before him a retirement age assumption which he can say should or should not be applied in this case. It is clear from the testimony of Farquhar and Levy that they believe that the retirement age assumption used by Farquhar in calculating the withdrawal liability of Schlitz is reasonable and appropriate, but based upon the use of the direct attribution method. Levy, the Plan's expert, acknowledged that he was not sure about what he thought the correct retirement age assumption should be if the withdrawal liability calculations were based on the presumptive method. Inasmuch as the Arbitrator has decided that the presumptive method is

the statutorily required method to be used in calculating the withdrawal liability of Schlitz, it seems clear that the Arbitrator has not received needed testimony from Levy or Farquhar.

Further, the Arbitrator is not certain what LoCicero's position is with respect to the retirement age assumption if the presumptive method is used. Testifying from Schlitz Exhibit 80, LoCicero did project an amount of withdrawal liability for Schlitz using the interest rate assumption of 7% and the presumptive method and the select and ultimate early retirement age assumption. However, in view of LoCicero's testimony concerning the undetermined status of a select and ultimate retirement age assumption in withdrawal cases, the Arbitrator is not persuaded that the select and ultimate retirement age assumption is a reasonable assumption to be used in this case. Accordingly, the Arbitrator believes he is required to refer this question back to the parties and their actuaries for further consideration and possible agreement.

The Arbitrator is not an actuary. The retirement age assumption is an actuarial decision. Any retirement age assumption to be used in this case must have the support of an actuary or actuaries or the actuarial profession. The Arbitrator defers a decision on this Issue until thirty (30) days after the date of the Award in this case, to allow the Plan and Schlitz and their actuaries to confer for the purpose of reaching an agreement, if possible, on the retirement age assumption to be used in the calculation of the Schlitz withdrawal liability.

ISSUE IV

WAS THE ADDITION OF INTEREST FOR THE YEAR 1981, BY THE PLAN, IN CALCULATING THE PAYMENT SCHEDULE CORRECT UNDER MPPAA?

In calculating the payment schedule of withdrawal liability which was delivered to Schlitz in September of

1981, Farquhar added interest on the unfunded vested benefits which he calculated as owing by Schlitz as of December 31, 1980. Schlitz attacked this addition of interest as being unfounded In MPPAA.

Schlitz withdrew from the Plan in September 1981. Under 29 USC 1391, the withdrawal liability of Schlitz was calculated as of December 31, 1980. 29 USC 1399(c) sets forth the payment requirements for withdrawal liability:

> [A]n employer shall pay the amount determined under §1391 . . . over the period of years necessary to amortize the amount in level payments determined under sub paragraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year.

The Plan argued that the use of the word "amortize" in the statute means that interest is to be added from December 31, 1980, the date as of which the withdrawal liability has been calculated. Schlitz argued that, since payments were to be calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs, the interest addition should not be made until the first annual payment as prescribed in the statute was due, namely, January 1, 1982.

This subject has been discussed at length in three (3) recent arbitrations. These are:

1. *Casablanca Industries, Inc and UFCW Local 23 GiantEagle Pension Fund* (Jaffe, Arbitrator), 7 EBC 2705, 2726
2. *Loomis Armored, Inc and Central States Pension Fund* (Tilove, Arbitrator), 8 EBC, 1899, 1918
3. *Carnation Co, Inc and Central States Pension Fund* (Nagle, Arbitrator), 9 EBC, 1409, 1448

In view of the extensive discussion of the issue of so-called "pre-demand interest" in these three cited cases, the Arbitrator believes it would be redundant to repeat what the three (3) Arbitrators have said in their Opinions. The three opinions thoroughly review all the arguments and documentation which are relevant and applicable to this issue. This Arbitrator is convinced that the Opinions expressed by Arbitrators Jaffe in *Casablanca* and Nagle in *Carnation* correctly set forth the application of MPPAA to the subject of pre-demand interest. In substance, it appears to this Arbitrator that in view of the clear statutory declaration that the payment schedule shall be determined as if the first payment is to be made on the first day of the plan year following withdrawal, which, in this case, would be January 1, 1982, and in view of the fact that the statute makes no provision for the payment of interest except on overdue payments, it is not correct to assess pre-demand interest on a withdrawing employer by interpretation of the word "amortize".

The critical point in the mind of this Arbitrator is that, although the statute requires the withdrawal liability to be calculated as of the end of the plan year immediately preceding the year of withdrawal, the statute does not say that the money is due at that time. Congress selected a logical date to be used for the calculation of withdrawal liability. However, Congress also provided a commencement date for the payment which is as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs. Accordingly, the Arbitrator decides that the inclusion of the pre-demand interest by the Plan, in this case, was improper and not in accordance with MPPAA, and, therefore, is clearly erroneous.

CALCULATION

During the course of the Arbitration, the Arbitrator requested the Attorneys and Actuaries for the Plan and

Schlitz to jointly attempt to produce calculations of withdrawal liability based upon sixteen (16) different scenarios. The parties responded cooperatively and furnished the Arbitrator a "Joint Submission Regarding Schlitz Withdrawal Liability Amount". The Joint Submission showed agreement in eight (8) of the scenarios. In the remaining eight scenarios, agreement on amounts was reached, depending upon certain decisions to be made by the Arbitrator. Further, depending upon the decision of the Arbitrator on the assessment of interest for the period January 1, 1981 through December 31, 1981 (the "pre-demand interest" issue), the Joint Submission stated that "it is not anticipated that there will be any material disagreements in the payment schedule once that issue is resolved". However, in view of the fact that the Arbitrator, on the basis of the evidence presented, is unable to decide the issue of the correct retirement age assumption to be used, it is not possible to arrive at the final calculation of the Schlitz withdrawal liability until the Plan and Schlitz respond to the Arbitrator as is required under Item 5 of the Award.

RELATED MATTER ON INTEREST

During the course of the Arbitration, reference was made to the fact that, when originally computing the payments of Schlitz, the Plan demanded quarterly payments, as is permitted by MPPAA, but the Plan added interest to the quarterly payments. As the arbitration progressed it appeared to the Arbitrator from remarks which were made by Plan counsel that the Plan had recognized Farquhar's error in adding interest to the quarterly payments and that the payment schedule was adjusted to reflect the deletion of this interest. If that has not been done, the Arbitrator directs that the interest payments shall be recalculated on an annual basis only.

REQUEST FOR ATTORNEYS' FEES AND COSTS BY THE JOS. SCHLITZ BREWING COMPANY

Under date of February 3, 1988, James W. Greer, one of the attorneys for Schlitz, filed with the Arbitrator a Request for Attorneys' Fees and Costs. The Request, supported by the Affidavit of Greer, requested fees and costs totalling $2,112.05. The Request was based upon the assertion that these costs were incurred by a delay on the part of the Plan in presenting its witness, Jeffrey Clayton, at the second set of arbitration hearings in Romulus, Michigan.

When the first scheduled Hearings were adjourned in Milwaukee, Wisconsin on August 14, 1987, Greer and Counsel for the Plan discussed the scheduling of witnesses to be heard on September 29, 1987 and September 30, 1987 and October 1, 1987, if needed. Greer requested that Jeffrey Clayton be available for his testimony on September 30, 1987 if time permitted taking his testimony that day.

Before the hearing resumed on September 29, 1987, Counsel for the Plan notified Greer that Jeffrey Clayton's testimony would have to be taken on October 1, 1987 because Plan Counsel wanted an opportunity to meet with Jeffrey Clayton prior to his taking the witness stand.

The Plan filed a written response and objection to the granting of the Request for attorneys' Fees and Costs by the Jos. Schlitz Brewing Company.

The Arbitrator can understand Greer's unhappiness about being required to stay over in Romulus, Michigan another day and using up additional time on this matter. However, in view of the obviously large expenditure of money by both the Plan and Schlitz in the preparation for and presentation of this case, the Arbitrator is of the opinion that the sum of $2,112.05 is a small cost.

The Arbitrator is not insensitive to costs and to delays which cause costs to be incurred, but the Arbitrator has also tried to accommodate the parties in this case to enable them to present their cases fully and fairly. Accordingly, the Arbitrator believes that the Plan must be allowed the latitude which it insisted upon in the handling of its witness, Jeffrey Clayton and, therefore, the Arbitrator denies the Request for Attorneys' Fees and Costs by the Jos. Schlitz Brewing Company.

ISSUES

The Plan and Schlitz had stipulated the following AGREED STATEMENT OF ISSUES at the outset of the Arbitration:

1. Whether the presumption of correctness in 29 USC 4221(a)(3) should be applied to any determination of the Plan?

2. Whether the presumption of correctness in 29 USC 4221(a)(3) is applicable to the resolution of Issues 3 and 4 below?

3. Whether the Plan was amended as a result of the May 22, 1981 and May 29, 1981 Memoranda of Understanding between Miller, Pabst and the Union?

4. If so, were these amendments applicable to the withdrawal of Schlitz from the Plan?

[Quite obviously, the statutory references in Issues 1 and 2 above are intended to be 29 USC 1401(a)(3).]

In addition, the Plan and Schlitz each submitted separate STATEMENTS OF ISSUES.

The Arbitrator believes that, in the foregoing Opinion and the following Award, he has responded to the AGREED STATEMENT OF ISSUES and to the separate STATEMENTS OF ISSUES, as well.

AWARD

The Arbitrator awards that:

1. To calculate the withdrawal liability of the Jos. Schlitz Brewing Company, the Milwaukee Brewery Workers' Pension Plan shall use the presumptive method of calculating withdrawal liability as provided in 29 USC 1391(b).

2. The interest assumption of seven (7%) percent adopted by the Plan's actuary is a reasonable interest assumption and shall be used in the calculating of the withdrawal liability of Schlitz.

3. Interest on the Schlitz withdrawal liability for the period January 1, 1981 through December 31, 1981 was improperly added to the liability, and the interest on the liability of Schlitz shall commence with January 1, 1982.

4. The request of Schlitz for an award of costs in the amount of $2,112.05 is denied.

5. A decision on the issue of the retirement age assumption is deferred for a period of thirty (30) days from the date of this Award to permit the Plan and Schlitz and their actuaries to confer to reach agreement, if possible, on the retirement age assumption to be used in calculating the Schlitz withdrawal liability. The Arbitrator shall be advised in writing by the Plan and Schlitz concerning the outcome of their conferences. If no agreement is reached between the Plan and Schlitz on this issue, the Arbitrator will take additional testimony or consider written submissions and will decide the issue, after which the withdrawal liability of Schlitz can be calculated.

In the event of judicial review of this Arbitration, the entire transcript, the exhibits, the briefs and the appendices presented in this case are incorporated into and made a part of this Award.

The Arbitrator retains jurisdiction of the case for a period of sixty (60) days, which may be extended if necessary, to permit the Plan and Schlitz to produce a response to Award Item 5 and to submit to the Arbitrator, in writing, any agreement reached in the calculation of withdrawal liability based upon the Joint Submission Regarding Schlitz Withdrawal Liability Amount, or based upon any other agreements, and based on the Award set forth hereinabove.

_____

BOAZ SIEGEL

Dated: July 7, 1988

EXHIBIT F

EXHIBIT B

BEFORE
BOAZ SIEGEL, ARBITRATOR

In the Matter of the
Arbitration Between

MILWAUKEE BREWERY WORKERS'
PENSION PLAN

and

JOS. SCHLITZ BREWING COMPANY

FINAL AWARD

Pursuant to the Opinion and Award issued by the undersigned Arbitrator under date of July 7, 1988 in this matter, Milwaukee Brewery Workers' Pension Plan (Plan) and the Jos. Schlitz Brewing Company (Schlitz), as directed by Item 5 of the Award, have met and agreed upon the retirement age assumption to be used in calculating the withdrawal liability of Schlitz.

In evidence of their agreement, the Plan and Schlitz have submitted to the Arbitrator, a document entitled "JOINT SUBMISSION REGARDING RETIREMENT AGE ASSUMPTION AND WITHDRAWAL LIABILITY CALCULATION", which is attached hereto and made a part of this Final Award.

This Joint Submission, in addition to resolving the issue of the retirement age assumption to be used, also sets forth a calculation of the withdrawal liability of Schlitz, based upon the Award of July 7, 1988 as well as the agreed upon retirement age assumption.

The agreements between the Plan and Schlitz, as set forth in the Joint Submission, resolves the remaining open Issue before the Arbitrator and also sets forth the agreed upon withdrawal liability of Schlitz.

Accordingly, the Arbitrator hereby readopts his Opinion and Award of July 7, 1988 and adds to it, the Joint Submission attached hereto, dated August 24, 1988 and hereby awards that the withdrawal liability of Schlitz, payable to the Plan, is in the amount of $23,300,000.00, to be paid according to the schedule set forth in Exhibit A of the Joint Submission.

This Arbitration matter is hereby closed.

BOAZ SIEGEL

Dated: August 24, 1988

BEFORE
BOAZ SIEGEL, ARBITRATOR

In the Matter of the
Arbitration Between
MILWAUKEE BREWERY WORKERS'
PENSION PLAN

and

J0S. SCHLITZ BREWING COMPANY

JOINT SUBMISSION REGARDING RETIREMENT AGE ASSUMPTION AND WITHDRAWAL LIABILITY CALCULATION

The actuaries for the Plan and Schlitz have reached agreement with respect to the retirement age assumption to be used in calculating the withdrawal liability of Schlitz. That assumption calls for the use of on-going retirement assumptions for all employees as of 12/31/79, termination assumptions for the withdrawing employer's employees (in this case Schlitz) as of 12/31/80 and on-going assumptions for all other plan participants.

The actuaries have also calculated the withdrawal liability of Schlitz on the basis of the above described retirement age assumption and the following assumptions and methods as found by the Arbitrator in his Opinion and Award dated July 7, 1988:

(1) Presumptive allocation method;

(2) 7% interest rate;

(3) Payment schedule with interest charged annually and excluding any interest charge for the year of withdrawal.

The withdrawal liability of Schlitz as of 12/31/80 is $23,300,000. The payment schedule which reflects the adjusted withdrawal liability of Schlitz is attached hereto as Exhibit A and incorporated herein by reference.

Dated: August 24, 1988

Harvey A. Kurtz
David C. Hertel
James W. Greer
Attorneys for Schlitz

The Milwaukee Brewery Workers' Pension Plan specifically reserves its right to appeal any and all appealable Issues from the Arbitrator's final order.

Marc Gertner
Robert G. Clayton
Attorneys for the Plan

SCHLITZ - J-PRIME PAYMENT SCHEDULE

WITHDRAWAL LIABILITY $23,300,000
PRESUMPTIVE
I = 7%
ONGOING ASSUMPTIONS WITH TERMINATION ASSUMPTION FOR SCHLITZ EMPLOYEES ONLY AT 12/31/80

PAYMENT NUMBER	QUARTERLY PAYMENT
1	986,370
2	986,370
3	986,370
4	986,370
5	986,370
6	986,370
7	986,370
8	986,370
9	986,370
10	986,370
11	986,370
12	986,370
13	986,370
14	986,370
15	986,370
16	986,370
17	986,370
18	986,370
19	986,370
20	986,370
21	986,370
22	986,370
23	986,370
24	986,370
25	986,370
26	986,370
27	986,370
28	986,370
29	880,331

Exhibit A

EXHIBIT G

Applicable Statutes

29 § 1002

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 § 1391

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year, exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change

arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

4(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of—

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of all contributions required to be made by

the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of—

(i) an amount equal to—

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction—

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amounts contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may be regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of—

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction—

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of—

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets

determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying—

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction—

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction—

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to—

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

29 § 1104 Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(i) an amount equal to —

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to —

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than

those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

29 § 1400

29 § 1400. Approval of amendments

(a) Amendment of covered multiemployer plans; procedures applicable

Except as provided in subsection (b) of this section, if an amendment to a multiemployer plan authorized by any preceding section of this part is adopted more than 36 months after the effective date of this section, the amendment shall be effective only if the corporation approves the amendment, or, within 90 days after the corporation receives notice and a copy of the amendment from the plan sponsor, fails to disapprove the amendment.

(b) Amendment respecting methods for computing withdrawal liability

An amendment permitted by section 1391(c)(5) of this title may be adopted only in accordance with that section.

(c) Criteria for disapproval by corporation

The corporation shall disapprove an amendment referred to in subsection (a) or (b) of this section only if the corporation determines that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the corporation.

(Pub.L. 93—406, Title IV, § 4220, as added Pub.L. 96—364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1239.)

29 § 1401

29 § 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of —

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

Supreme Court, U.S.
FILED
DEC 22 1993
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No. 93-768

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-768

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

This case involves the calculation of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Under the statutory scheme, a portion of a plan's unfunded vested benefits (i.e., the difference between the present value of the vested benefits and the value of the assets of the plan) are allocated to an employer who ceases participation in the plan. The statute includes detailed rules governing the calculation, allocation, assessment, and payment of withdrawal liability. The statute also prescribes certain procedures for resolving disputes over withdrawal liability, which include mandatory arbitration. *See generally* 29 U.S.C. §§ 1381-1405.

The principal issue litigated below involved the allocation method used by Petitioner, the Milwaukee Brewery Workers' Pension Plan ("Plan"), in determining the amount of the liability incurred by Jos. Schlitz Brewing Company ("Schlitz") upon withdrawal from the Plan.[1] The statute provides that unfunded vested benefits are to be allocated using the so-called "presumptive" method, unless the plan is amended to adopt another permissible method. 29 U.S.C. § 1391(b). In the proceedings below, Petitioner argued that the Plan had been amended to adopt a permissible alternative method—the "direct attribution" method. The practical effect of adopting the direct attribution method would have been to shift approximately $14 million in pension liability from the Miller Brewing Company ("Miller") to Schlitz. The arbitrator, the district court and the court of appeals all agreed, however, that the Plan had not been properly amended, a determination that Petitioner does not challenge in this Court.[2]

Petitioner also argued below that notwithstanding the lack of a plan amendment, Schlitz was under a fiduciary duty to adopt the direct attribution method. This is one of the two issues upon which Petitioner seeks review here. The problem with this issue is that this case has nothing to do with employers who act as fiduciaries or their responsibilities to pension plans. It is only by ignoring or

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[1] In 1982 Schlitz was acquired by Respondent The Stroh Brewing Company ("Stroh"). Schlitz was merged into Stroh, which assumed its liability to the Petitioner. Stroh is a corporation and is wholly-owned by The Stroh Companies, Inc. Stroh has no subsidiaries to list pursuant to Rule 29.1.

[2] The arbitrator determined that the plan agreement, pursuant to its own terms, could only be amended with the consent of all of the parties, including Schlitz, and that Schlitz had never consented to the plan amendment. Pet. App. Ex. E.

Citations are to the Arbitrator's Opinion ("Pet. App. Ex. E at ——"), the arbitration hearing record ("Transcript Vol. —— at ——"), selected hearing exhibits ("Schlitz Trial Ex. ——"), and the opinion of the court of appeals ("Pet. App. Ex. A at ——").

mischaracterizing the relevant facts that Petitioner is able to craft this issue. As noted by the Seventh Circuit, there is "an air of unreality" to it. 3 F.3d at 1001, Pet. App. Ex. A at 11.

A secondary issue in this case was whether Schlitz should have been assessed interest on the amount of its withdrawal liability for the year in which the withdrawal occurred. Although the arbitrator found no such interest liability, the district court disagreed and ordered Schlitz to pay interest for the period in question. The court of appeals reversed the district court on this point, holding that the statute did not contemplate the imposition of such interest.

A. Statement of Facts

1. *Schlitz withdraws from joint bargaining.*

On January 21, 1981, Schlitz gave timely notice of its withdrawal from the Milwaukee Brewers' Association and joint bargaining with the remaining employers in the association. The remaining employers were Miller and the Pabst Brewing Company ("Pabst"). Pet. App. Ex. E at 5, 7; Transcript Vol. I at 39-40; Schlitz Trial Ex. 3.

Brewery Workers' Local Union No. 9 ("Local 9") notified Schlitz, Miller and Pabst on March 20, 1981 of its desire to amend the collective bargaining agreement and the Plan. Pet. App. Ex. E at 8. The collective bargaining agreement provides in relevant part as follows:

> 8. The Milwaukee Brewery Workers' Pension Plan shall be maintained in full force and effect until June 1, 1981. In the event that either party to this contract notifies the other in writing not less than sixty (60) days prior to June 1, 1981, of its desire to terminate or modify such Plan, then the parties shall meet to study and negotiate necessary revisions.

Pet. App. Ex. E at 25; Schlitz Trial Ex. 1 at 25. At approximately the same time, the Plan advised Local 9

and the employers that the presumptive method of determining employer withdrawal liability would apply unless the Plan was amended to provide for another method. Pet. App. Ex. E at 6.[3]

Miller and Pabst, through a negotiating committee, began bargaining with Local 9 on March 25, 1981 with respect to the collective bargaining agreement and the Plan. Schlitz and Local 9 began separate bargaining on April 7, 1981 on the same issues. Pet. App. Ex. E at 8.

During the early negotiations between Miller, Pabst and Local 9, Miller and Pabst recognized that they could not bargain on behalf of Schlitz. As late as May 4, 1981, the chief negotiator for Miller and Pabst stated:

> We can only agree for Pabst and Miller—I cannot speak for Schlitz . . . . We have the obligation of bargaining with you in good faith. You have the right to bargain with us collectively or individually. We are not refusing to sit at the table but we don't have to agree with Schlitz. We are here to get a Contract . . . . I will not speak for Schlitz on the pension plan.

Schlitz Trial Ex. 8 at 26-26B; Transcript Vol. IV at 563-64.

2. *Miller seeks to amend the Plan.*

During the contract negotiations, Miller conducted an analysis of its withdrawal liability under MPPAA and concluded that its own exposure would be reduced if the Plan were amended to adopt the direct attribution method. Miller then sought to convince Pabst that Pabst was better off amending the Plan to provide for the direct attribution

[3] The Plan was managed and administered by a Joint Committee consisting of members appointed by Local 9 and the employers. The members of the Joint Committee were the designated fiduciaries of the Plan. The Joint Committee did not have the power to amend the Plan (Pet. App. Ex. E at 5-6).

method. This presented a problem for Miller because Pabst had already concluded that its liability would increase under the direct attribution method. Transcript Vol. II at 349, Vol. IV at 551, 567, 568-571; Schlitz Trial Ex. 21-24.

Miller retained an actuary and set out to persuade Pabst to adopt the direct attribution method. After several meetings with Pabst, Miller was able to persuade Pabst that amending the Plan would not increase its liability. Miller's actuary had concluded that the only effect of the direct attribution method would be to transfer $14,000,000 of unfunded liability from Miller to Schlitz. An internal Miller memorandum dated May 15, 1981, provides in relevant part:

> The important point is if we have convinced Pabst that they are not better off using the Presumptive Rule. Miller Brewing Company is a giant step closer to having the Plan amended to use the Direct Attribution Rule when calculating the Withdrawal Liability. The difference is approximately $14,000,000.

Direct Attribution Rule			Presumptive Rule		
Miller	28%	$ 31,100,000	Miller	41%	$ 45,500,000
Pabst	35%	38,800,000	Pabst	35%	38,800,000
Schlitz	37%	41,100,000	Schlitz	24%	26,700,000
		$111,000,000			$111,000,000

Transcript Vol. II at 349-51; Schlitz Trial Ex. 24 at 2, 3.

Absent from the discussions between Miller and Pabst and the internal memoranda which detail those discussions is any expression of fiduciary concern for the Plan's beneficiaries.[4] As the court of appeals noted, the record indicates that the bargaining representatives for Miller and

[4] This is not surprising because the selection of a particular method of determining an employer's withdrawal liability does not affect the beneficiaries. The unfunded liability remains the same. The only effect of a change in the methodology is to reallocate the unfunded liability among the participating employers.

Pabst did not act as fiduciaries but negotiated in their own self-interest. 3 F.3d at 1003, Pet. App. A at 14. The focus of that self-interest was the cost of the Plan to them and the allocation of the unfunded liability among Miller, Pabst and Schlitz. Schlitz Trial Ex. 21-24.

On May 20, 1981, Local 9 notified Miller, Pabst and Schlitz of a meeting to be held on May 22, 1981 "for the purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan." Schlitz Trial Ex. 12. The purpose of the meeting, according to Local 9, was to jointly negotiate Local 9's proposed amendments to the Plan. Pet. App. Ex. E at 9; Transcript Vol. I at 74-75.

The response of Schlitz to Local 9's demand for joint bargaining was not surprising: Schlitz had properly withdrawn from the Association and joint bargaining. Schlitz did not want to be drawn back into joint bargaining with Miller and Pabst, particularly with respect to the increase in pension benefits sought by Local 9. The response of Schlitz to Local 9 states in relevant part that:

> This [notice of the May 22, 1981 meeting] implies or assumes, unless and until you inform us differently, a joint meeting (and joint bargaining with your Union) on pensions with the other two breweries.
>
> This is to advise that we do not intend to bargain jointly with any other employer. . . .
>
> * * * *
>
> If our understanding of the intention of your letter of May 20 is not correct, and you do not anticipate and are not requesting joint bargaining (by Schlitz, Pabst and Miller) on pensions, please so inform us in writing.
>
> In such event, we will be pleased to meet with you on pensions and discuss our proposals and your proposals on the subject separately; or we will continue to meet on this subject matter together with the other subjects, as we have over the past several weeks.

Schlitz Trial Ex. 15; Transcript Vol. II at 159-60.

Local 9 did not respond to this letter or otherwise indicate that the May 22, 1981 meeting was to be anything but a joint negotiating session with Miller, Pabst and Schlitz on Local 9's pension proposal. Local 9's pension proposal, at least with respect to the proposal made to Schlitz, did not include an amendment to provide for another method of determining withdrawal liability. Schlitz, which did not want to be drawn into joint bargaining and which was unaware that the issue of withdrawal liability was even on the agenda, did not attend the meeting. Transcript Vol. I at 74-77, 80-81; Transcript Vol. II at 159-62, 296-97.[5]

Miller, Pabst and Local 9 met on May 22, 1981 and agreed to an amendment to the Plan adopting the direct attribution method of determining employer withdrawal liability. The form of the amendment, however, failed to comply with the technical requirements of MPPAA. *See* 29 C.F.R. §§ 2642.7, 2642.11. Local 9, Miller and Pabst met again on May 29, 1981 and corrected the deficiencies in the initial amendment. Schlitz was not invited to and received no notice of this meeting. Pet. App. Ex. E at 9; Transcript Vol. II at 303, Vol. III at 464, Vol. IV at 582-83.

Although Schlitz and Local 9 continued to bargain separately with respect to all issues, including Plan amendments, no amendment on the subject of withdrawal liability was ever proposed to Schlitz by Local 9.[6] The existing collective bargaining agreement between Schlitz and Local 9 expired on May 31, 1981. Local 9 went out on

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[5] Upon timely withdrawal from multiemployer bargaining, Schlitz had the right to bargain separately with Local 9 and Local 9 had the obligation to bargain separately with Schlitz on all mandatory subjects of bargaining. *Retail Associates, Inc.*, 120 N.L.R.B. 388, 393-95 (1958), *cited with approval in Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410-11 (1982).

[6] Petitioner's contention that Schlitz "unilaterally imposed upon the Plan the method which is in its own best interest" (Pet. at i) is thus a mischaracterization of the record below.

strike and Schlitz and Local 9 negotiated to impasse. Pet. App. Ex. E at 9-10; Transcript Vol. I at 85-87, 311, Vol. II to 311.

3. *Schlitz withdraws from the Plan.*

On July 31, 1981, Schlitz announced that it was permanently closing its Milwaukee plant. On August 14, 1981, the Schlitz representative on the Joint Committee gave notice of his resignation. Pet. App. Ex. E at 8; Transcript Vol. V at 605.

On August 17, 1981, the Joint Committee directed the Plan's actuary to calculate the withdrawal liability of Schlitz based on the amendment agreed upon by Miller, Pabst and Local 9. The Joint Committee did not perform any investigation to determine whether the Plan could be amended without the agreement of Schlitz. Pet. App. Ex. E at 9; Transcript Vol. II at 252-53, 352.

The Plan presented its demand for withdrawal liability and a payment schedule to Schlitz in a letter dated September 29, 1981. The Plan calculated the liability of Schlitz using the direct attribution method and demanded $41,031,046. In calculating the payment schedule, the Plan added interest to that liability for the period from December 31, 1980 to December 31, 1981. Schlitz made its first payment to the Plan on October 29, 1981. Pet. App. Ex. E at 9-10, 39.

B. The Decisions Below

1. *The arbitrator.*

The parties proceeded to arbitration on a number of issues, many of which are not relevant here. Hearings were held in 1987, and the arbitrator issued an Opinion and Award in July 1988.

The arbitrator concluded that the Plan had not been amended to adopt the direct attribution method. The

Plan, by its terms, could be amended only upon the assent of each of the employers and the union. In the absence of agreement by Schlitz, therefore, there could be no amendment. Pet. App. Ex. E at 18-19. The arbitrator also rejected the Plan's argument that Schlitz was under a fiduciary obligation to agree to the proposed plan amendment adopting the direct attribution method. *Id.* at 25-28. Finally, the arbitrator concluded that the imposition of interest for the year of withdrawal is "not in accordance with MPPAA" and accordingly such interest was disallowed. *Id.* at 40.

2. *The district court.*

Schlitz sought confirmation of the arbitrator's award in the district court, and the Plan counterclaimed seeking to have the award vacated or modified. Following briefing by the parties, the district court issued its Decision and Order on June 6, 1991.

The district court agreed that the Plan could be amended only by the unanimous consent of the employers and the union. Slip op. at 14-16.[7] It further agreed that "employers do not act as fiduciaries when they amend a plan," *id.* at 20, rejecting all of the Plan's arguments to the contrary. *Id.* at 23-31. The court disagreed with the arbitrator, however, on the question of whether interest was properly assessed for the withdrawal year and vacated that portion of the arbitrator's award. *Id.* at 33-39.

3. *The court of appeals.*

Both parties appealed to the United States Court of Appeals for the Seventh Circuit, and the court issued its opinion on August 13, 1993.

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[7] The district court's opinion was not reproduced in the Petitioner's Appendix. We have lodged copies of this opinion with the Clerk.

The court of appeals affirmed the district court insofar as the district court held that the Plan had not been amended and that no fiduciary duty attached to the decision of whether to adopt an amendment. 3 F.3d at 1001-03, Pet. App. Ex. A at 11-15. However, it disagreed with the district court's award of interest for the withdrawal year. *Id.* 1003-04, Pet. App. Ex. A at 15-18. Thus, the court of appeals directed the district court to enforce the arbitrator's award in its entirety. *Id.* at 1004, Pet. App. Ex. A at 18.

On November 12, 1993, the Plan filed its Petition for Writ of Certiorari. By letter application to the Clerk of the Court, Schlitz sought and obtained a 10-day extension of time within which to file a Brief in Opposition, through and including December 23, 1993.

REASONS FOR DENYING THE WRIT

Petitioner alleges a conflict among the circuits on the issue of liability for interest during the year of withdrawal. However, an analysis of the facts of these cases, including the most recent decisions, reveals that the asserted conflict may not exist. The issue is also not sufficiently important to justify a grant of certiorari.

The second issue raised for review involves the entirely separate matter of the method used in calculating the withdrawal liability of Schlitz. The unanimous conclusion of the arbitrator and lower courts on this issue reflects the *unique* factual circumstances presented in this case. Moreover, the only legal issue raised by Petitioner in this regard is one on which there is no conflict among the circuits. Therefore, even if the Court should grant certiorari on the first question presented, there is no reason for the Court to consider the second question.

I. THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST UNDER MPPAA IS NOT A QUESTION THAT WARRANTS CONSIDERATION BY THIS COURT ON CERTIORARI

The Petitioner argues that the courts of appeals are in "intolerable" conflict on the issue of whether interest may be assessed for the year in which withdrawal occurs. Pet. at 11. If there is a conflict on this issue, it is hardly intolerable. The Seventh Circuit has questioned whether there is any conflict at all. But even assuming disagreement between the circuits at some level of analysis, the manner of calculation of withdrawal year interest under MPPAA is of far less importance than Petitioner asserts and does not warrant a grant of certiorari.

This issue is considerably more complex than Petitioner's treatment of it would indicate. Referred to by the lower courts as "gap," "pre-withdrawal," "pre-demand" or "first year" interest, it is not simply a question of whether interest may be assessed for an entire year, a "yes" or "no" proposition. As the court of appeals explained, the statute mandates that withdrawal liability is to be measured as of the end of the plan year preceding the withdrawal ("calculation date"). 29 U.S.C. § 1391(c)(2)(C)(i). The amortization schedule is calculated as if the first payment were made at the beginning of the plan year following the withdrawal ("presumptive first payment date"). 29 U.S.C. § 1399(c)(1)(A)(i); *see* 3 F.3d at 1003-04, Pet. App. Ex. A at 16. *Actual* payments may begin *during* the year in which the withdrawal occurred, as was the case here.[8] The "withdrawal year"—the period between the calculation date and the presumptive first

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[8] MPPAA specifies that payments must begin no later than 60 days after the plan makes a demand for withdrawal liability. 29 U.S.C. § 1399(c)(2). Thus, if an employer withdraws relatively early in the year and the plan presents its demand promptly thereafter, actual payments will commence before the presumptive first payment date.

payment date—has been subdivided for purposes of analysis into several discrete periods, including

- the period between the calculation date and the date of withdrawal;
- the period between the date of withdrawal and the date payments actually begin;
- the period between the date of withdrawal and the presumptive first payment date;
- the period between the date payments actually begin and the presumptive first payment date.

Because the propriety of including interest for these various periods may or may not be presented by the facts of a particular case, a meaningful evaluation of a potential conflict between the views of the courts of appeals requires an analysis of the particular facts of each case.

In *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), the plan sought interest from the calculation date to the date on which the plan made a demand, more than three years later.[9] The arbitrator denied interest for the entire period. The district court vacated the arbitrator's award and allowed interest from the date of withdrawal to the date the plan made demand for payment. The Third Circuit modified the district court's order only in part: "We will modify the district court's calculation of pre-demand interest to provide only first-year interest." 916 F.2d at 110. The only portion of first-year interest calculated by the district court was from the date of withdrawal to the presumptive first payment date. Although far from clear, this suggests that *Huber* only provides for interest from the date of withdrawal. This apparent holding raises questions because the rationale of

[9] The *Huber* plan filed a petition for a writ of certiorari, which petition was ultimately dismissed pursuant to Rule 46. *See* 113 S. Ct. 1070 (1993). The petition did not seek review of the withdrawal year interest issue. 59 U.S.L.W. 3571 (1991).

the court's decision suggests that interest should be allowed from the calculation date. Further confusion is created by the court's apparent inconsistent use of the terms "first-year interest" and "pre-demand interest." *See* 916 F.2d at 95, 110.

The only reported decision in the Third Circuit to apply *Huber* interpreted it to allow interest from the date of withdrawal *not* the calculation date:

> Pursuant to a separate and distinct holding in *Huber, supra,* under these facts the Fund is necessarily entitled to interest payments for the first year, that is from the date of the withdrawal liability until the statutorily assumed first payment date, that being the "first day of the plan year following the plan year in which the withdrawal occurs."

Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters Fund, 16 Employee Benefits Cas. (BNA) 2100, 2104 (W.D. Pa. 1993) (quoting 29 U.S.C. § 1399(c)(1)(A)(i)). The Third Circuit affirmed the district court's decision without an opinion. *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund,* 1993 U.S. App. LEXIS 26,924 (3d Cir. Sept. 21, 1993). Thus, contrary to Petitioner's assertion (Pet. at 14), it is not clear that *Huber* provides for the running of interest from the calculation date.

The facts of the Fourth Circuit's case dealing with withdrawal year interest render it reconcilable with *Huber*, as applied in *Colteryahn*. In *Borden, Inc. v. Bakery & Confectionery Union & Industry Int'l Pension,* 974 F.2d 528 (4th Cir. 1992), withdrawal occurred on the last day of the plan year, i.e., the day before the presumptive first payment date. The plan assessed interest for the withdrawal year—effectively, from the calculation date to the date of withdrawal—and the district court affirmed. The Fourth Circuit reversed. 974 F.2d at 536. The assessment of withdrawal year interest under those

facts would have resulted in the imposition of interest for the period *before* the withdrawal.

In the opinion below, the Seventh Circuit joined the Fourth Circuit in *Borden* by concluding that MPPAA does not authorize the assesment of interest before the date of withdrawal (i.e., before an employer's obligation to pay arises). 3 F.3d at 1004, Pet. Ex. A at 17. In joining the Fourth Circuit, the Seventh Circuit recognized the ambiguity found in *Huber* and sought to reconcile its decision with that of *Huber*:

> To the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the . . . calculation date and the date of actual withdrawal, we disapprove that decision. (*Whether Huber actually holds any such a thing is doubtful.*)

Id., Pet. App. Ex. A at 18 (emphasis added).

The rationale of the Seventh Circuit on this issue is persuasive. Although MPPAA authorizes the assessment of interest in a number of instances, 29 U.S.C. § 1399 (c)(3), (4), (5), it does not authorize interest *prior* to the time the employer's withdrawal liability arises. Under MPPAA's withdrawal liability scheme, an employer's withdrawal liability is *calculated* based upon "the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws . . . ." 29 U.S.C. § 1391(c)(1)(C)(i). However, the establishment of a calculation date has nothing to do with the assessment of interest. An employer's withdrawal liability under MPPAA *does not arise* until sixty (60) days after receipt of written demand from the plan. 29 U.S.C. § 1399(c)(2). As the Seventh Circuit correctly held, "Schlitz was not liable for a penny until it withdrew from the Plan and received a notice of liability" and "MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises."

3 F.3d at 1004, Pet. App. Ex. A at 17. Contrary to the Plan's contention, the word "amortize" in 29 U.S.C. § 1399(c)(1)(A)(i) does not support the assessment of pre-withdrawal interest. There is no principle of amortization that calls for a party to pay interest on a debt before the debt is incurred. It makes no economic sense to assess interest against a withdrawing employer until after it ceases to contribute to the Plan and its obligation to make withdrawal liability payments arises.

The courts of appeals appear to be moving towards a consistent interpretation of MPPAA with respect to this issue. Although the cases may contain apparently inconsistent language, they are not in such clear conflict as to warrant a resolution of the issue by this Court. It remains to be seen whether an "intolerable" conflict will arise. Only a few courts have had an opportunity to address the issue. The Petition should be denied to allow further development and clarification of the issue by the lower courts.

In any event, the issue has arisen in only a handful of cases since the enactment of MPPAA in 1980. It is insignificant when compared with the other actuarial issues (i.e., the interest rate assumption used for the present value calculations and the retirement age assumption) which dominate these cases. There is no reason to believe that in any of these cases the employer would have proceeded to arbitration on the withdrawal year interest issue alone.

Petitioner posits that, in the absence of action by this Court, races to the courthouse and costly litigation will ensue. Pet. at 14. The sparsity of reported cases and the monetary insignificance of the issue suggest otherwise. Plans and their actuaries have been calculating the withdrawal liability of employers under MPPAA for well over a decade. There is every reason to believe that plans and withdrawing employers will continue to resolve this and

the other actuarial issues short of litigation. It is only when they are unable to resolve the more significant actuarial issues that litigation ensues.

Petitioner also overstates the monetary stakes. The amount of withdrawal liability originally assessed in this case (over $41 million) was unusually large and thus the amount of interest assessed was also substantial (over $2.8 million). The amount of withdrawal liability involved in the other reported cases is generally substantially less. *See, e.g., Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) (withdrawal liability of $268,168.81 assessed); *Borden, Inc. v. Bakery & Confectionery Union & Industry Pension*, 974 F.2d 528 (4th Cir. 1992) (withdrawal liability of $757,803 assessed by the plan; $102,461 allowed by the court). Thus, the amount of withdrawal year interest in some cases will be even more modest and likely to be resolved by agreement of the parties.

In summary, certiorari is not warranted to review the withdrawal year interest issue, either by an "intolerable" conflict between the circuits or by the importance of the issue.

II. THE DISPUTE CONCERNING THE APPROPRIATE ALLOCATION METHOD FOR CALCULATING THE WITHDRAWAL LIABILITY OF SCHLITZ WAS CORRECTLY DECIDED BY THE COURT OF APPEALS BASED ON THE UNIQUE FACTS OF THIS CASE AND GOVERNING LAW

Petitioner contends that the court of appeals erred in holding that Schlitz was not required to act as a fiduciary when bargaining over a proposed amendment to change the method of calculating an employer's withdrawal liability. Petitioner is wrong. The court of appeals' conclusion is correct and consistent with every other circuit to consider the issue. When bargaining with unions over the terms of pension plans, employers are expected to act

in their own financial interest and not as fiduciaries for the plan beneficiaries. There is no reason for this Court to grant certiorari to decide this issue.

Moreover, Petitioner's fiduciary issue is not fairly presented in this case because of the unique factual setting. The arbitrator and courts below found that the plan was never amended because Schlitz never received effective notice or an opportunity to vote, and Petitioner does not raise any challenge to these findings in this Court.

Petitioner has raised what the court of appeals characterized as a "fallback" position:

> The Plan has a fallback position, with several steps. (1) When selecting a method of withdrawal liability, all three employers acted as fiduciaries to the Plan. (2) A fiduciary acting in May 1981 would have been required to prefer the direct attribution method to the presumptive method. (3) Had Schlitz attended the meetings in May 1981 it would have voted for the direct attribution method even though that disserved its own interests (and had Schlitz violated its fiduciary responsibility, a court would have intervened). (4) Because the direct attribution method *would* have been adopted by unanimous consent had Schlitz fulfilled its responsibilities, the arbitrator should have treated the Plan *as if* it had been amended.
>
> There is a certain logic to this, but also an air of unreality. . . .

3 F.3d at 1001, Pet. App. Ex. A at 11.

Although the court of appeals rejected the initial premise that the employer was required to act as a fiduciary, it also evinced considerable skepticism with regard to the other points in this chain of reasoning, based upon the factual circumstances of this case.[10] The decision below

[10] Contrary to the Plan's characterization of the facts, none of the employers (including Miller and Pabst) acted like fiduciaries

is thus bound up with the unique facts of this case, and certiorari should not be granted.

A. The Court of Appeals Correctly Held that Schlitz Would Not Have Been Required to Act as a Fiduciary if it Had Been Given the Opportunity to Vote on the Proposed Plan Amendment

The authority for Petitioner's expanded concept of fiduciary responsibility remains a mystery. Matters relating to pension plans have long been held to be mandatory subjects for collective bargaining. *See, e.g., Inland Steel Co.*, 77 N.L.R.B. 1, 7 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *see also NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981) (noting that pension agreements are "the product of bargaining between the representatives of the employees and those of the employer").

An employer does not become a fiduciary merely because it is negotiating the terms of a pension plan. *United Independent Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1262, 1268 (7th Cir. 1985); *Sutton v. Weirton Steel Division*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). The lower courts have consistently concluded that establishing the terms of an ERISA-covered benefit plan is not a fiduciary function. *E.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990); *Musto v. American General Corp.*, 861 F.2d 897, 911-13 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432-33 (9th Cir. 1986); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Amato v. Western Union Int'l,*

(they were bargaining in their own self-interest). Schlitz was not obligated to attend the meetings in May 1981 (Local 9's notice was inadequate and Schlitz was engaged in separate bargaining). Schlitz did not vote against the plan amendment (the plan amendment was never proposed to Schlitz by Local 9).

Inc., 773 F.2d 1402, 1426-27 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *United Air Lines*, 756 F.2d at 1268; *Sutton*, 724 F.2d at 410-11.[11]

The authority upon which Petitioner relies in support of its contrary argument is inapposite. Thus, the legislative history cited by Petitioner (Pet. at 26) refers to MPPAA's *de minimis* exception and certain abatement rules which have nothing to do with the selection of an alternative method of calculating withdrawal liability. The *de minimis* exception and abatement rules "eliminate or reduce" the liability of a single employer due to the unique circumstances surrounding its withdrawal.

Under the *de minimis* exception, part or all of an employer's liability may be forgiven. 29 U.S.C. § 1389. The abatement rules permit an employer to withdraw from a plan with unfunded vested benefits without incurring any withdrawal liability. 29 U.S.C. §§ 1384, 1386. These rules permit a plan to collect less than the entire amount of withdrawal liability the plan could demand under other applicable provisions of MPPAA. Because it would appear to be a clear violation of a fiduciary duty to collect less than the full amount of withdrawal liability an employer

[11] Petitioner nevertheless insists that plan amendments that "impact vested benefits" give rise to fiduciary duties. Pet. at 23. However, even if the allocation method did "impact" vested benefits in the sense of affecting plan funding (which it does not), it would not give rise to a fiduciary responsibility. Employers bargain with respect to a number of issues that might be said to "impact" vested benefits in this sense. For example, the level of contributions directly impacts the funding level of vested benefits, yet is routinely the subject of collective bargaining. *Professional Administrators, Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 644 (6th Cir. 1987); *Malden Mills Indus., Inc. v. ILGWU Nat'l Retirement Fund*, 766 F. Supp. 1202, 1209 (D. Mass. 1991). As long as the parties comply with the minimum funding requirements of ERISA, 29 U.S.C. § 1082; I.R.C. § 412, they are free to negotiate any level of contributions. Likewise, the parties should be free to negotiate a method of withdrawal liability as long as the method chosen is permitted by MPPAA.

owes, the legislative history cited by the Plan explains that a plan's choice of rules forgiving all or part of an employer's withdrawal liability is not a *per se* violation of fiduciary standards. The cited legislative history is taken out of context and does not support the contention urged by the Petitioner.

The cases cited by the Petitioner are equally unavailing. None of them addresses, much less holds, that parties become fiduciaries by negotiating plan amendments which adopt a particular method of allocating employer withdrawal liability.[12] Indeed, the cases cited by the Plan assume that the trustees of a plan were given the authority to amend the pension agreement. The cases do not address the situation where the authority to amend the pension agreement remains in the hands of the collective bargaining parties.

B. If Schlitz Had Acted as a Fiduciary, it Would Not Have Been Required to Vote in Favor of the Amendment Proposed by Miller

The second step of Petitioner's fallback argument is unpersuasive and turns on the particular facts of this case as well. This step assumes that the Plan's beneficiaries would have been better off had the Plan been amended to adopt the direct attribution method. However, the facts are otherwise in this case.

There is no credible evidence, and the arbitrator made no finding, that the selection of a particular allocation method adversely affected the Plan's beneficiaries. Had

[12] In particular, Petitioner mischaracterizes the Court's recent opinion in *Concrete Pipe*. *See* Pet. at 20, 27. *Concrete Pipe* dealt with certain statutory presumptions that come into play in resolving disputes over withdrawal liability. 29 U.S.C. § 1401(a)(3). One of those presumptions goes to the reasonableness of *actuarial* methods and assumptions employed to calculate the plan's unfunded vested benefits. 29 U.S.C. §§ 1393; 1401(a)(3)(B). The method used to allocate the plan's underfunding among the participating employers was not at issue.

the Plan been amended, the only effect would have been the transfer of $14 million in liability for unfunded vested benefits from Miller to Schlitz. As the courts below noted, the choice of a particular allocation method does not affect the total unfunded liability of the plan; it merely redistributes the responsibility for that liability among the participating employers. 3 F.3d at 1002, Pet. App. Ex. A at 14 ("Each method produces a total of $111 million in withdrawal liability; only the allocation among employers is at issue."); slip op. at 27 ("[T]he different methods of calculation merely shift responsibility for unfunded vested benefits among the Employers.").

Petitioner argues that the allocation of liability among the employers might affect collectibility. Pet. at 21-22. This scenario is entirely speculative, however. The bargaining parties, at the time they agreed on a plan amendment, could not be expected to know whether any of the employers would withdraw from the plan, the order in which they might withdraw, or the relative financial strength of the withdrawing and remaining employers. It is unrealistic to expect that the bargaining parties possess this kind of foresight.

C. The Arbitrator Did Not Have the Authority to Treat the Plan as if it Had Been Amended

Finally, Petitioner argues that the Plan should be deemed amended, presumably by operation of law. Even assuming that amending the Plan was a fiduciary function and that adopting the direct attribution method was in the best interest of the Plan, the argument fails. If the other parties were convinced of the need for such an amendment, they should have given Schlitz proper notice and sought its agreement. Had Schlitz refused, the parties could have pursued their remedies in the courts. Having failed to take these steps, however, Petitioner is not entitled to have the Plan reformed.

Petitioner argues that even in the absence of a plan amendment MPPAA mandates the adoption of the direct

attribution method in this case. This argument is precluded by the statutory scheme. MPPAA provides that the presumptive method shall apply unless the Plan is amended to provide for one of a number of other permissible methods. 29 U.S.C. § 1391(b). Authorization for the selection of other methods is found in subsection (c)(1), which reads in relevant part as follows:

> A multiemployer plan . . . *may be amended* to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) . . . .

29 U.S.C. § 1391(c)(1) (emphasis added.)

The statute does not read "shall be amended." The statutory alternatives are thus permissive not mandatory. The statutorily preferred method under MPPAA is the presumptive method. The aribtrator had no choice in the matter. In the absence of a plan amendment, MPPAA mandates the application of the presumptive method.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

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On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"). Central States is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the

Trustees owe an undivided duty of loyalty. The purpose of the Central States pension plan is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the plan.

Under the plan participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. The plan covers 164,000 retirees currently drawing benefits and 238,000 active participants.

Central States is the largest multiemployer pension plan in the United States with assets of $11.733 billion and vested benefit liabilities of $13.768 billion. Central States' unfunded vested benefits ("UVB") are thus $2.035 billion. The UVB is not immediately due because the liabilities represent the present value of benefits payable over many decades into the future. The expected time to amortize the UVB at current funding rates is about 21 years. The principal means for funding the UVB, as well as for funding current benefit accruals, is the contributions of employers made pursuant to their collective bargaining agreements. Central States presently receives contributions from over 5,000 employers through 9,164 billing accounts from 42 states and Canada.[1]

Additional funding is required by statute when an employer withdraws (ceases to have an obligation to contribute) from Central States. This withdrawal liability is an employer's pro-rata share of the UVB. Withdrawal liability is payable in installments with interest ("amortized," to use the statutory term). *See* generally Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1381, *et seq.* As

[1] A billing account is generally assigned to each collective bargaining agreement. Some employers are subject to more than one agreement.

of October 31, 1993, Central States had 283 outstanding assessments of withdrawal liability totalling approximately $290 million. Of these 86 occurred in 1993 in the total amount of $42 million. Since September 26, 1980,[2] Central States has collected about $370 million in withdrawal liability.

Central States' withdrawal liability program, other than its size, is similar to Petitioner Milwaukee Brewery Workers' Pension Plan. Due to its size, however, Central States brings a somewhat broader perspective to consideration of certain issues such as that presented in Question 1 of the Petition. Central States files this brief *amicus curiae* in support of Petitioners on Question 1.

INTERESTS OF CENTRAL STATES

In the decision below the United States Court of Appeals for the Seventh Circuit ruled that in calculating and collecting withdrawal liability Petitioners, a multiemployer pension plan like Central States may not apply an amortization charge (interest) to the first annual billing cycle. *Schlitz v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3378 (U.S. Nov. 12, 1993) (No. 93-768). This decision is directly in conflict with an earlier decision of the Third Circuit in *Huber v. Casablanca Industries*, 916 F.2d 85 (3rd Cir. 1990), *cert. dismissed*, —— U.S. ——, 113 S.Ct. 1070 (1993). The Fourth Circuit has also ruled in conflict with the Third Circuit on this question in *Borden v. Bakery & Confectionery Union Pension Fund*, 974 F.2d 528 (4th Cir. 1992). The Fourth and Seventh Circuits are not completely aligned, however, as we explain *infra*.[3]

[2] This is the effective date of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which added the withdrawal liability provisions of ERISA.

[3] Inexplicably the Seventh Circuit was "doubtful" of its conflict with the Third Circuit, but clearly joined the Fourth Cir-

This conflict among the circuits creates a problem of immense proportions for multiemployer plans like Central States that cover more than one federal judicial circuit. Which law should Central States follow? While Central States is administered in Rosemont, Illinois, within the Seventh Circuit, only 30% of its billing accounts are in the Seventh Circuit. Central States has actual or potential withdrawal liability in 42 states and in each of the eleven numbered judicial circuits. The following table illustrates the breadth of Central States' contributing employer base.

Circuit	Billing Accounts	Percent of Total
1	12	0.1
2	63	0.7
3	170	1.9
4	293	3.2
5	116	1.3
6	2,944	32.1
7	2,781	30.3
8	1,961	21.4
9	228	2.5
10	409	4.5
11	180	2.0
	9,157	100.0%

The conflict among the circuits presents an administrative nightmare to Central States because every withdrawal liability assessment is wrong somewhere. Nor does the location of the billing account resolve the dilemma on a case by case basis. Many contributing employers conduct operations across state, and judicial boundaries. Each of the five largest contributors to Central States does business

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cuit. 3 F.3d at 1004. The Fourth Circuit acknowledged the conflict with the Third Circuit. 974 F.2d at 536. The Third Circuit expressly held the entire first year amortization charge unlawful and reversed the district court and arbitrator rulings to the contrary. 916 F.2d at 99-100.

in virtually every judicial circuit as their number of billing accounts suggests:

Company	Billing Accounts
ABF Freight System, Inc.	132
Consolidated Freightways	173
Roadway Express	182
United Parcel Service (UPS)	101
Yellow Freight Systems, Inc.	150

UPS, for example, does business in every state and has billing accounts in 22 states located in seven judicial circuits.

For over 13 years since the enactment of MPPAA Central States has charged interest on the UVB it allocates to withdrawn employers.[4] The interest is calculated and applied once each year as an amortization charge that is built into the employer's withdrawal liability payment schedule. *See* 29 U.S.C. § 1399(c)(1)(A). Since the UVB is calculated as of the end of the year preceding the employer's year of withdrawal, yet the first annual installment is assumed due on the first of the year following the year of withdrawal, Central States applies a full year's amortization charge to the first payment.[5] *Id.* At the current rate of 8% this amounts to about $23 million of the current assessments. Central States has consistently (and uniformly among its withdrawn employers) applied this interest to over 1,000 withdrawals.

According to the Seventh Circuit the practice by a pension plan of applying an amortization charge to the first annual payment is wrong, at least to the extent the

---

[4] The rate, as required by statute, is the same as applied to the determination of plan liabilities on a present value basis. *See* 29 U.S.C. § 1399(c)(1)(A)(ii).

[5] The payment is not literally due on that date. The schedule is abstract until the pension plan issues a demand for payment. The first year amortization charge covers the one-year period preceding the first payment date contained in the demand.

interest applies to the period preceding the employer's date of withdrawal from the plan, but such interest may (indeed must) be applied to all subsequent annual payments. If the court is right, then Central States has been wrong all along. The United States Court of Appeals for the Third Circuit has, however, reached the opposite conclusion. Under the Third Circuit ruling Central States has applied the amortization charge correctly.

Which decision should Central States follow? As far as the courts are concerned Central States should follow the right decision—the decision that governs the jurisdiction in which the inevitable lawsuit is filed. In other words the precise amount of withdrawal liability of an employer is unknowable until after commencement of litigation in a particular jurisdiction. Until that time there are at least two potentially correct amounts. Like a quantum particle, withdrawal liability exists in an indeterminate probabilistic state until it is measured in a particular way by the court.

This problem is exacerbated by ERISA's broad venue provisions. Venue is proper for withdrawal liability matters where the plan is administered or where a defendant resides or does business. 29 U.S.C. § 1451(d). While Central States is administered in Illinois, it arguably does business in at least the 42 states from which it has billing accounts. Since these states may be found in each of the eleven numbered federal judicial circuits, Central States cannot escape the conflicting law of these circuits.[6]

[6] Forum shopping will abound under this conflict. Employers, of course, will want to sue in the Seventh or Fourth Circuit. Central States will sue in the Third Circuit or any of the uncommitted circuits—most likely the Sixth or Eighth Circuit where more than half of the contributors are found. Success on this question will depend on who gets the jump on the opponent. The plan might file simultaneously with its demand for payment. The employer might file its declaratory action when it withdraws (before the plan sponsor has time to react). Perhaps the plan could anticipate withdrawals and file protective lawsuits to coincide with critical dates such as the expiration of collective bargaining agreements.

In sum the administrative and legal problems created by the conflict among the circuits on this amortization charge issue have, arguably, an even greater impact on Central States than on Petitioner. Many of the other 2,000 multiemployer pension plans will also be experiencing these problems to one degree or another. Central States, thus, serves as an apt example of why this conflict must be resolved immediately by granting the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. STATUTORY PROVISIONS FOR AMORTIZING WITHDRAWAL LIABILITY HAVE BEEN GIVEN CONFLICTING INTERPRETATION BY THE THIRD, FOURTH, AND SEVENTH CIRCUITS.

The problem presented by the conflict among the circuits on Petitioner's Question 1 involves no less than a significant percentage of every withdrawal liability assessment ever issued by a multiemployer plan. This is because the issue is whether or not to charge interest for the first payment period of the withdrawal liability payment schedule. In Central States' case this is 8% of every assessment. In the Third Circuit this interest may, and thus must, be charged.[7] In the Seventh and Fourth Circuits it may not. The conflict is in the courts' interpretations of 29 U.S.C. § 1399(c)(1)(A) and in particular the meaning of the term "to amortize."

The statute provides that "an employer shall pay [its withdrawal liability] over the period of years necessary to amortize the amount in level annual payments. . . ." 29 U.S.C. § 1399(c)(1)(A)(i). To determine the payment schedule the plan first calculates the amount of withdrawal liability and the amount of the annual pay-

[7] Fiduciary obligations would prohibit plan trustees from gratuitously declining to collect interest where interest is permitted to be charged.

ment. Then interest is applied, and a payment schedule, similar to a mortgage schedule, results.[8]

The payment period is "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs" and each subsequent payment were made on the anniversary date of the first. § 1399(c)(1)(A)(i). There is apparently no disagreement from any quarter that interest will accrue between these payments. This, after all, is what it means to "amortize" a debt.[9] There would be no conflict if the employer's share of the UVB were determinable as of the date of its withdrawal and its first payment were also due on that date. Interest would simply begin to accrue on that date against the unpaid principal, but the first payment would consist of principal only. It is on the period that precedes the first annual payment that the courts of appeals part ways.

The problem leading to the conflict is that plans cannot generally calculate the UVB as of the date of withdrawal. An actuarial valuation is necessary to the determination of the plan's UVB. This complex process takes place annually and is performed by the plan's enrolled actuary. 29 U.S.C. § 1023(d) and § 1023(a)(4). Recognizing this practicality the statute requires that withdrawal liability be determined as of the last day of the plan year

[8] This annual payment is independent of the withdrawal liability (roughly equal to the employer's pre-withdrawal annual contribution). § 1399(c)(1)(C). It may or may not be enough to amortize the employer's share of the UVB over a reasonable period of time. To prevent a problem of perpetual payments the statute abates any amounts payable beyond a 20-year period and defines withdrawal liability accordingly. §§ 1399(c)(1)(B) and 1381(b).

[9] The statute plainly contemplates that interest will be applied to principal in deriving this schedule. "The determination of the amortization period . . . shall be based on the assumptions used for the most recent actuarial valuation for the plan." § 1399(c)(1)(A)(ii). There is only one actuarial assumption that might apply to this kind of calculation—the plan's discount rate for future liabilities. This, then, is the interest rate (8% in Central States case) that plans use to amortize withdrawal liability.

preceding the year of withdrawal. *See e.g.*, §§ 1391(c)(2)(C) and 1391(c)(3)(A). Thus a single calculation of UVB takes place and applies to all withdrawals occurring in the following year. This requirement, however, produces a gap between the calculation date and the deemed first payment date.[10] The question is whether to fill the gap with interest. It is the practice of plans like Petitioner and Central States to adjust that withdrawal liability by applying a first year amortization charge to account for the gap between the calculation date and the assumed date of first payment one year later.[11] The Third Circuit saw no error in this practice. *Huber*, 916 F.2d at 98. The Seventh Circuit, however, was concerned that some of this period predates the withdrawal. Thus, arguably, interest is being applied to a period before the debt arose. *Schlitz*, 3 F.3d at 1004. That is one way of looking at it. Another view, however, is that the UVB of the plan is always a debt of the employer. For withdrawal liability purposes it is determined in the past and will have changed by the date of withdrawal and again by the first payment date. By applying interest to the intervening year Congress, and plans, could ensure that the employer's share of UVB was not held artificially low by the timing of the actuarial valuation process.

Central States favors the latter view. The payment schedule is a wholly artificial process, as the Seventh Circuit recognized. "MPPAA does not imply that withdrawing employers *owe* anything as of the end of the year before they drop out." *Id.* (emphasis in original). The

[10] It also produces a gap between the calculation date and the withdrawal date. The court below reserved the question of post-withdrawal interest. 3 F.3d at 1004. "An assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct, would not be troubling." *Id.* The Fourth Circuit, by contrast, ruled against any pre-billing interest without distinguishing between pre- and post-withdrawal periods.

[11] This interest is, thus, sometimes called "gap year interest" and sometimes "first year interest."

UVB calculation is performed as of a date *before* the withdrawal. The payment schedule is derived as if the payments were made on the first year of each succeeding year. But the first payment is not actually due until the plan bills the employer. 29 U.S.C. § 1399(c)(2). In effect, then, the statute requires the plan to develop a payment schedule overlay. This overlay is then transferred to the actual first payment date, which is specified in (and will be later than) the notice of withdrawal and demand for payment that the plan eventually will send the employer. In some cases this could be years after the withdrawal.[12] The Seventh Circuit erred in taking the schedule too literally as if the first payment were actually made on the first day of the year following the withdrawal such that some of the interest would have accrued before the withdrawal. The Third Circuit correctly understood the abstract "immediate annuity" process at work. *Huber*, 916 F.2d at 98.

The following hypothetical payment schedules illustrate this conflict.[13] We assume that an employer's withdrawal liability for a June 30, 1993 withdrawal is $1,000,000, that its annual payment is $250,000, and that the payment is actually made on the first day of the plan year following the withdrawal.

[12] The Third Circuit case provides an apt example. Casablanca withdrew on December 31, 1988, in a partial withdrawal. The calculation of withdrawal liability requires an adjustment (proration) for the partial withdrawal. 29 U.S.C. § 1381(b)(1)(B). That calculation under 29 U.S.C. § 1386 requires knowledge of the next year's (post-withdrawal 1989) contributions. The assessment and demand for payment could not be made until 1990, more than a year after the withdrawal. Yet under the Third Circuit view only one year of interest accrues as of the first payment date (no matter how delayed) because the payment schedule is fixed "as if" payment began on the first day of the year following the withdrawal.

[13] The legislative history of MPPAA also contains a numerical example similar to Column III that incorporates the first year amortization charge. H. Rep. No. 96-869, 96th Cong., 2d Sess. 83 (*reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2951). *See also, Huber*, 916 F.2d at 98, n. 30. As the *Huber* court notes, the example was not intended to illustrate the interest issue. It does, however, tend to show the drafter's mindset to treat withdrawal liability like an immediate annuity.

ALTERNATIVE PAYMENT SCHEDULE [14]

		I. Seventh & Fourth Circuits	II. Seventh Circuit Alternative	III. Third Circuit
Year 0	Initial Liability	$1,000,000	$1,000,000	$1,000,000
Year 1	Liability	1,000,000	1,000,000	1,000,000
	+Interest	0	40,000	80,000
	−Payment	250,000	250,000	250,000
Year 2	Liability	750,000	790,000	830,000
	+Interest	60,000	63,200	66,400
	−Payment	250,000	250,000	250,400
Year 3	Liability	560,000	603,200	646,400
	+Interest	44,800	48,256	51,712
	−Payment	250,000	250,000	250,000
Year 4	Liability	354,800	401,456	448,112
	+Interest	28,384	32,116	35,849
	−Payment	250,000	250,000	250,000
Year 5	Liability	133,184	183,572	233,961
	+Interest	10,655	14,686	18,717
	−Payment	143,839	198,258	250,000
Year 6	Liability	0	0	2,678
	+Interest	0	0	214
	−Payment	0	0	2,892

As noted the liability is not really owed as of December 31, 1992 (the calculation date) because the withdrawal had not occurred. Nor is the first payment really due on

[14] The Seventh Circuit joined the Fourth Circuit, which clearly takes the strong, no-interest view of Column I. The Seventh Circuit might allow interest to accrue beginning on the date of withdrawal, however, which would result in Column II. The period between Year 0 and Year 1, however, is variable and depends on when the plan issues its demand for payment. The gap period is often, if not generally, greater than one year. Since the Seventh Circuit might allow post-withdrawal interest, the first interest charge in Column II (Year 1) would exceed the Column III amount (of $80,000) in cases where more than one year passes between withdrawal and demand.

January 1, 1994 (although the schedule is calculated "as if" it were) but rather on some future First Day of Year 1, depending on when the demand is made. This schedule is simply the overlay. If this withdrawal had taken place on January 1, 1993, the employer would, under Column I, pay no interest for 1993 regardless of when the plan demands payment. If the withdrawal occurred on December 31, 1993, and a demand were immediately made, the employer would, under Column III, pay a full year's interest for one day.[15] These are rare extremes. Demands for payment are made only after the withdrawal is detected and referred to the plan sponsor for action. 29 U.S.C. § 1382. Payments commence months—sometimes years—after the withdrawal. Congress, however, was concerned only with precision in the calculation, not in the application of the schedule. As to actual payments, the law of large numbers applies to produce a rough equity. *Schlitz*, 3 F.3d at 1004.

Perhaps recognizing the problem of both under- and over-inclusiveness of interest represented by Fourth and Third Circuits decisions, respectively, the Seventh Circuit reserved decision on whether interest might apply from the date of withdrawal forward. Allowing such interest was, in fact, the position taken by the district court in *Huber* that the Third Circuit reversed. *See* 916 F.2d at 96. There is considerable logical merit to this approach since it protects plans from loss during any post-withdrawal period required to discover the withdrawal, calculate the liability, and issue the demand. If this is the correct method, then both the Third and the Fourth Circuits are wrong.

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[15] If the demand were not immediately made, no additional interest would accrue, however, under *Huber*. The Third Circuit ruled that pre-billing interest, that is interest on the period between the assumed first payment under the statute and the actual payment under the plan's demand, may not be charged. This obviously treats the statutory schedule strictly as an overlay. If the Third Circuit is wrong and the Seventh Circuit is right, then pre-billing interest from the date of withdrawal until the date payment is demanded should be allowed.

Central States believes that interest is properly charged to the first payment period. When the payment overlay is looked at in the abstract, it is obviously an immediate annuity with interest applied to each period, including the first. *Huber*, 916 F.2d at 98. This is Congress' meaning in the word "amortize." If it meant anything else it would have said so (*i.e.*, "the withdrawal liability is due on the [date of withdrawal] [or first day of the year following the withdrawal] and payable in level annual installments beginning on that date"). The post-withdrawal interest the Seventh Circuit might allow is also a reasonable reading of the statute. But, as we argue below, a definitive answer in either direction is necessary from this Court so that plans can carry out their statutory obligations. Thus the petition should be granted.

II. THE CONFLICTING DECISIONS PLACE AN UNACCEPTABLE BURDEN ON PENSION PLANS, CONTRIBUTING EMPLOYERS, AND THE COURTS AND SUBVERT STATUTORY PURPOSE.

A great deal of the complexity of the statute in dictating how plans are to calculate withdrawal liability is a result of Congress' desire to insure evenness in the application of the law to withdrawn employers. Plans have little discretion and must apply the law mechanically. *Huber*, 916 F.2d at 93. Indeed Congress provided expressly for government approval of plan amendments that affect the calculation of withdrawal liability. 29 U.S.C. § 1394. Such evenness, however, is no longer possible.

Because of the conflict in the circuits plans like Central States are faced with one statute but two meanings. Every calculation may be done at least two ways with no *a priori* correct way. Only after a lawsuit fixes the jurisdiction, can certainty be achieved and then only with respect to one specific calculation. The next withdrawn employer may—probably will—be subject to a different jurisdiction, a different law, and a different result.

The result, of course, of all this uncertainty is a heavy burden on the resources of the courts and of plans, even though Congress sought specifically to reduce the burden

on both. Thus, for example, Congress directed withdrawal liability disputes to arbitration first. 29 U.S.C. § 1401. Yet neither plan nor employer may risk waiting the results of an arbitration before filing suit. At a minimum one or two parallel, venue-confirming, declaratory actions will accompany every arbitration.

Further Congress sought to reduce collection costs for plans.[16] The conflict in the circuits virtually guarantees a longer, costlier process as plans defend their calculations in the conflicting jurisdictions. Only by capitulation to the Seventh Circuit view can plans avoid employer lawsuits on this issue. But of course that decision would require trustees to defend themselves from the fiduciary breach claims of participants and the Secretary of Labor and possibly from contributing employers, whose contribution burdens are increased by the capitulation.

CONCLUSION

For the reasons stated above this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[16] *See e.g.*, S1076 The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, Committee on Labor and Human Resources, United States Senate, 96th Congress, 2d Session, April 1980, at p. 21, disapproving "dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan."

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No. 93-768

In the Supreme Court of the United States

OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
PETITIONER

v.

JOS. SCHLITZ BREWING COMPANY AND
STROH BREWERY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

An employer that withdraws from a multiemployer pension plan is required to reimburse the plan over time for the employer's statutory share of the unfunded vested benefits that existed at the end of the year preceding withdrawal. The issue presented by question 1 in the certiorari petition in this case is:

Whether, under 29 U.S.C. 1399(c)(1)(A), interest accrues on the withdrawing employer's liability for unfunded vested benefits (i) from the end of the year *preceding* withdrawal (the date as of which the employer's liability is calculated), (ii) from the date that the employer's withdrawal in fact occurred, or (iii) from the presumed date of the employer's first payment toward satisfaction of the liability (specified by 29 U.S.C. 1399(c)(1)(A)(i) to be the beginning of the year *after* the withdrawal occurred).

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In the Supreme Court of the United States

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No. 93-768

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
PETITIONER

v.

JOS. SCHLITZ BREWING COMPANY AND
STROH BREWERY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States on question 1 in the petition.[1]

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[1] The Pension Benefit Guaranty Corporation (PBGC) and the Secretary of Labor each have an interest in the issue presented by this case. The PBGC, a wholly owned government corporation, 29 U.S.C. 1302, is responsible for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. 1301-1461, including the provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208. As part of its insurance program, the PBGC guarantees

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set out at Pet. App. G1-G20, the following provisions of 29 U.S.C. 1399, added to the Employee Retirement Income Security Act of 1974 (ERISA) by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 94 Stat. 1208, are relevant to this case.

1. 29 U.S.C. 1399(c)(1)(A) provides, in relevant part:

> (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan

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the payment of certain pension benefits to participants in insolvent multiemployer pension plans. 29 U.S.C. 1361, 1431. The liability provisions of MPPAA are important to the financial stability of multiemployer plans and the PBGC insurance system. This brief does not represent the views of the PBGC. See note 9, *infra*.

The Secretary of Labor has specific enforcement responsibilities under Title I of ERISA, including its fiduciary responsibility provisions. For that reason, the Secretary has an interest in clarifying the circumstances in which trustees of multiemployer pension plans have a duty to collect interest on withdrawal liability.

> year. Actual payment shall commence in accordance with paragraph (2).
>
> (ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

2. 29 U.S.C. 1399(c)(6) provides:

> Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the [Pension Benefit Guaranty Corporation.]

STATEMENT

1. The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) imposes liability on an employer that withdraws from a multiemployer pension plan for the employer's statutory share of the plan's unfunded vested benefits. 29 U.S.C. 1381(a). Calculation of the amount of that liability is a multi-step process. First, the plan's total unfunded vested benefits are calculated, generally as of the end of the plan year *preceding* the withdrawal. See 29 U.S.C. 1391(b)(2)(A)(ii), (c)(2)(C)(i), (c)(3)(A) and (c)(4)(A). Second, the employer's share of the plan's unfunded vested benefits is determined, pursuant to one of the allocation methods described in 29 U.S.C. 1391. See 29 U.S.C. 1381(b).[2] Third, where appropriate, the

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[2] The actual calculation is more complicated than the two preceding sentences of text describe. Under the "presumptive" method used in this case, for example, the withdrawing employer is assigned a share of various pools of unfunded

employer's share is adjusted pursuant to the special provisions in 29 U.S.C. 1381(b)(1)(A), (B), (C) and (D). See also 29 U.S.C. 1386, 1389, 1399(c)(1)(B), 1405; *Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85, 95 & nn. 14-22 (3d Cir. 1990), cert. dismissed, 113 S. Ct. 1070 (1993). Thus, the amount of the employer's withdrawal liability is its prescribed share of the deficiency in the plan's funding (*i.e.*, the difference between the actuarial present value of vested pension benefits and the current value of plan assets), calculated as of the end of the plan year preceding withdrawal. See 29 U.S.C. 1393(c); *Combs* v. *Classic Coal Corp.*, 931 F.2d 96, 98 (D.C. Cir. 1991); *Masters, Mates & Pilots Pension Plan* v. *USX Corp.*, 900 F.2d 727, 733 (4th Cir. 1990).

A withdrawing employer is not required to pay its liability in one lump sum. Rather, clause (i) of 29 U.S.C. 1399(c)(1)(A) requires a schedule to be established for payment of the total amount of the employer's liability "over the period of years necessary to amortize the amount in level annual payments * * *,

vested benefits—the plan's unfunded vested benefits as of the end of the last plan year ending prior to the enactment of MPPAA in 1980, and the increase in the plan's unfunded vested benefits in each of the plan years ending after 1980—in each case reduced by five percent per year up to the year of withdrawal. See 29 U.S.C. 1391(b). As this Court has stated, the presumptive method imposes on the withdrawing employer "a liability proportional to the employer's share of contributions to the plan during the years of its participation." *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2273 (1993). Under all allocation methods, however, the last day of the plan year preceding the date of withdrawal is the latest date for which calculations are made relevant to determining the employer's share of the plan's unfunded vested benefits allocable to that withdrawal.

calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs." 29 U.S.C. 1399(c)(1)(A)(i). The *amount* of each annual payment is established by reference to the level of the employer's annual contributions to the plan prior to its withdrawal. 29 U.S.C. 1399(c)(1)(C).[3] The *number* of such annual payments "necessary to amortize" the employer's liability is determined in accordance with clause (ii) of 29 U.S.C. 1399(c)(1)(A). That provision specifies that "[t]he determination of the amortization period described in clause (i)"— *i.e.*, the number of "level annual payments"—"shall be based on the assumptions used for the most recent actuarial valuation for the plan." 29 U.S.C. 1399(c)(1)(A)(ii). Those "assumptions" include the plan's actuarial interest rate.[4] Thus, the amortization schedule is to be based

[3] Clause (i) of subparagraph (A) of Section 1399(c)(1) specifies that the "level annual payments" are to be "determined under subparagraph (C)." Subparagraph (C) prescribes the complex formula for determining the amount of each annual payment, based on the employer's contributions during the ten years preceding the withdrawal.

[4] Subsection (c)(6) of 29 U.S.C. 1399 confirms that the plan's actuarial interest rate is among the assumptions referred to in subsection (1)(A)(ii). Subsection (c)(6) provides: "Except as provided in paragraph (1)(A)(ii), *interest* under this subsection *shall be charged* at rates based on prevailing market rates for comparable obligations" (emphasis added). This language plainly contemplates that "interest * * * shall be charged" under paragraph (1)(A)(ii); but rather than calculating that interest according to the "prevailing market rates" utilized in other circumstances under Section 1399 (see note 8, *infra*), the introductory phrase in subsection (b)(6) requires use of the interest rate "provided in paragraph (1)(A)(ii)" itself— *i.e.*, the

on the interest-rate assumption "used for the most recent actuarial valuation for the plan." 29 U.S.C. 1399(c)(1)(A)(ii). The higher the actuarial interest rate under the plan, the longer will be the "period of years necessary to amortize" the employer's liability in level annual payments. 29 U.S.C. 1399(c)(1)(A)(i).

Section 1399(c)(1)(A)(i) requires that the amortization schedule be established "as if the first payment were made on the first day of the plan year *following* the plan year in which the withdrawal occurs" (emphasis added)—referred to as the "presumed first payment date"—and that each subsequent annual payment will be made on the first day of each subsequent year.[5] In fact, however, the employer is not required to commence making its withdrawal-liability payments until the plan issues a demand for payment. The plan is to make such a demand, setting forth the amount of liability and the payment schedule, "[a]s soon as practicable after an employer's complete or partial withdrawal." 29 U.S.C. 1399(b)(1). The employer must then begin payments in accordance with the schedule established by the plan "no later than 60 days after the date of the demand," even

interest rate that formed part of "the assumptions used for the most recent actuarial valuation for the plan."

[5] The Act limits the employer's liability to a maximum of 20 years of annual payments. 29 U.S.C. 1399(c)(1)(B). In practice, the statutory calculation often results in a payment schedule of less than 20 years. In this case, the payment schedule adopted by the arbitrator, and upheld by the court of appeals, requires quarterly payments over a period of less than eight years. See Pet. App. F5.

if the employer contests the amount of liability. 29 U.S.C. 1399(c)(2).[6]

Under this statutory scheme, the dates used to calculate the amount of withdrawal liability are not the same as the dates of actual events—such as the date of withdrawal and the date of the employer's first actual payment. Instead, the Act fixes the last day of the plan year *preceding* withdrawal as the calculation date for determining the employer's share of the plan's unfunded vested benefits, and requires the amortization schedule (with interest at the rate used in the most recent actuarial valuation of the plan) to be "calculated as if the first payment were made on the first day of the plan year *following* the plan year in which the withdrawal occurs." 29 U.S.C. 1399(c)(1)(A)(i) (emphasis added). The issue in this case is whether the employer's liability includes interest during the so-called "gap year" from the date of calculation of that liability (at the end of the plan year preceding withdrawal) to the date of the presumed first payment (at the beginning of the plan year following withdrawal).

2. a. The facts in this case were stipulated before the arbitrator. On June 1, 1981, following a breakdown in collective bargaining, respondent's union employees went on strike. Pet. App. A2, E8. On July 31, 1981, respondent announced that it was permanently closing its Milwaukee plant, and on August 14, 1981, respondent withdrew from the plan. *Ibid.*

[6] Although the amortization schedule is established on the basis of a series of annual payments, the withdrawing employer must make those payments in quarterly installments or at other intervals specified by plan rules. See 29 U.S.C. 1399(c)(3).

Petitioner calculated respondent's liability for its share of the plan's unfunded vested benefits as of the end of the prior plan year (December 31, 1980) and issued a demand for payment on September 29, 1981. *Id.* at A3, E8. Respondent made its first payment on October 29, 1981. *Id.* at E10.[7]

The plan included interest for the year of the withdrawal (1981) in its assessment of respondent's withdrawal liability. Pet. App. A15. The arbitrator excluded interest for that year, *id.* at E38-E40, explaining that because "the statute makes no provision for the payment of interest except on overdue payments,[8] it is not correct to assess pre-demand interest on a withdrawing employer by interpretation of the word 'amortize' " in 29 U.S.C. 1399(c)(1)(A)(i). Pet. App. E40.

b. The district court reversed the arbitrator. The court noted that MPPAA requires payment of the employer's withdrawal liability to be amortized over a period of time. The court concluded that "use of the word 'amortization' implied that interest on the liability would be included in the payments." Pet. App. D2 n.1.

c. The court of appeals reversed. Pet. App. A15-A18. It found no authority in MPPAA for assessing interest for the period before the employer's withdrawal from the plan. *Id.* at A17. Noting that multi-

[7] The payment schedule adopted by the arbitrator, and upheld by the court of appeals, requires 29 quarterly payments. Pet. App. F5.

[8] See 29 U.S.C. 1399(c)(3) (interest accrues on quarterly payment if not paid when due); 29 U.S.C. 1399(c)(5) (provision for immediate payment, upon default, of total outstanding liability and "accrued interest").

employer plans calculate their funding status only once each year, the court described the Act's year-end calculation date for withdrawal liability as merely an effort on the part of Congress to "spare[] actuaries the need to revalue plan assets and liabilities every time an employer withdraws during the year." *Ibid.* In the court's view, "[e]stablishing a simple rule for calculating funding shortfalls has nothing to do with interest, and the MPPAA does not imply that withdrawing employers *owe* anything as of the end of the year before they drop out." *Ibid.* The court also noted that, although the Act "specifically authorizes assessing the withdrawing employer with interest under several circumstances," it "says nothing about interest prior to withdrawal." *Ibid.* In the court's view, neither the word "amortize" in 29 U.S.C. 1399(c)(1)A)(i) nor any other language in MPPAA authorizes prewithdrawal interest, which it characterized as "the assessment of interest before an employer's obligation to pay arises." *Ibid.*

In concluding that the Act does not authorize interest from the date on which the employer's withdrawal liability is calculated (at the end of the plan year preceding withdrawal), the court of appeals expressed its agreement with the analysis of the Fourth Circuit in *Borden, Inc.* v. *Bakery & Confectionery Union*, 974 F.2d 528, 536 (1992), "that the MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises." Pet. App. A17. By the same token, the court expressed its disagreement with the decision of the Third Circuit in *Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85, 95, 100 (1990), cert. dismissed, 113 S. Ct. 1070 (1993), "[t]o the extent [that] *Huber* suggests that there are circumstances under which

an employer must pay interest for the gap between the * * * calculation date and the date of actual withdrawal." Pet. App. A18. The court below stated that it would not be troubled by an "assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct." *Id.* at A16. The court did not decide that issue, however, because the plan had not contended that interest should be assessed for the period between respondent's withdrawal (August 1981) and the presumed first payment date (January 1982). *Id.* at A18.

DISCUSSION

There are approximately 2,300 defined-benefit multiemployer pension plans in the United States, covering an estimated 8.4 million active and retired workers. Those plans are funded by approximately 720,000 contributing employers. The statutory withdrawal liability provisions at issue in this case have effect every time an employer withdraws from one of those plans. The method of calculating interest on withdrawal liability can make a difference of several million dollars to the plan and to the withdrawing employer. The circuits are in conflict on the proper calculation of interest on withdrawal liability. Large multiemployer plans—such as amicus Central States, Southeast and Southwest Areas Pension Fund—have contributing employers in several States. The plans and their contributing employers may thus be subject to different standards of withdrawal liability, depending solely on the happenstance of the forum for the litigation. Review of the interest issue by this Court therefore is warranted.

1. Three courts of appeals have now considered the question presented in this case, and they have reached different conclusions.

a. In *Huber* v. *Casablanca Industries*, the Third Circuit concluded that interest on withdrawal liability is to be assessed for the entire year between the calculation date and the presumed first payment date. 916 F.2d at 95-100.[9] Because "the unfunded vested benefit calculation represents an employer's share of the amount needed for a fund to break even *as of the calculation date*," the court viewed interest as necessary to compensate the plan for the growth of that amount between the calculation date and the withdrawal date due to the time value of money. *Id.* at 96 (emphasis in original).

The Third Circuit read the language of 29 U.S.C. 1399(c)(1)(A)(i)—establishing an amortization schedule "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs"—as designed to create an "immediate annuity," in which payments are due at the end of payment intervals and the first payment includes both principal and interest. 916 F.2d at 97-98. Under MPPAA, the court reasoned, the "interval is one year, and the first payment is presumed to be due at the *end* of the first year." *Id.* at 98. In the Third Circuit's view, the "only way to construe" the statutory language is to treat it as

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[9] The PBGC participated in *Huber* as amicus curiae in the Third Circuit. See 29 U.S.C. 1302(b)(1). In its brief, the PbGC argued that withdrawal liability does not accrue interest during any period before the first payment is required under the amortization schedule established by the plan sponsor. The *Huber* court rejected the PBGC's position with respect to "gap year" interest. See 916 F.2d at 95-100; Pet. App. A16.

creating an immediate annuity, in which interest accrues during the year preceding the first presumed payment. *Ibid.*[10]

b. In *Borden, Inc.* v. *Bakery & Confectionery Union*, the Fourth Circuit expressly disagreed with the Third Circuit in *Huber*, and disallowed interest for the period prior to the presumed first payment date. 974 F.2d at 536. The court concluded that no provision of MPPAA expressly authorizes interest prior to that date, and it found that statutory silence particularly "telling" (*ibid.*):

> When a statute prescribes amounts and computations with as much detail and thoroughness as is the case with ERISA and fails to authorize interest during a specifically authorized delay in payment, we conclude that the omission was deliberate.

Ibid. The court noted that MPPAA expressly authorizes assessment of interest against an employer that defaults in making withdrawal liability payments (see 29 U.S.C. 1399(c)(5)) but, in the court's view, it makes no specific provision for assessment of

[10] Respondent contends (Br. in Opp. 13) that *Huber* allows interest only for the period *after* withdrawal. But the analysis adopted by the Third Circuit in *Huber* clearly allows interest for the period after the calculation date at the end of the year preceding withdrawal. See 916 F.2d at 95, 96, 99-100. The district court in *Huber* recognized that fact on remand by holding that, "[c]onsistent with the mandate received from the Court of Appeals, it is therefore ordered that * * * [t]he [a]rbitrator shall award interest to the fund on the amount demanded of the withdrawing employer *for the period between October 1, 1981 and September 30, 1982.*" *Huber* v. *Casablanca Indust., Inc.*, No. 87-77, Mem. Dec. (W.D. Pa. Nov. 27, 1990) (emphasis added).

interest between the date on which withdrawal liability is calculated and the presumed first payment date. 974 F.2d at 536.

c. In the present case, the Seventh Circuit offered yet another possible answer to the interest question. The court disallowed interest for the period prior to the employer's withdrawal from the plan, holding that "MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises." Pet. App. A17. The court expressly rejected the contrary analysis of the Third Circuit in *Huber*, stating that "[t]o the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the * * * calculation date and the date of actual withdrawal, we disapprove that decision." *Id.* at A18.

Although the Seventh Circuit in this case expressed agreement (see Pet. App. A17) with the analysis of the Fourth Circuit in *Borden* (which disallowed interest for the entire "gap year" between the calculation date and the presumed first payment date), it stated that it "would not be troubl[ed]" by an assessment of interest for the portion of the gap year between the date of withdrawal and the presumed first payment date. *Id.* at A16. The court suggested that "[i]t may help to think of the employer as 'borrowing' the amount of withdrawal liability from the plan on the date of withdrawal, and owing this sum plus interest under the schedule set per § 1399(c)(1)(A)(i)." Pet. App. A17.[11] The court declined to decide whether

[11] A panel of the Third Circuit recently affirmed a district court decision that allowed interest to accrue only from the date of withdrawal, rather than from the calculation date. *Carl Colteryahn Dairy, Inc.* v. *Western Pa. Teamsters & Employers*

interest properly could be assessed between the date of withdrawal and the presumed first payment date, however, because the plan had not specifically made an alternative request for interest for that more limited period. *Id.* at A18.

The three courts of appeals that have addressed the interest issue have thus reached different results: the Third Circuit has interpreted MPPAA to provide for interest beginning as of the "calculation date" (at the end of the year preceding withdrawal); the Fourth Circuit has interpreted the Act to provide for interest beginning at the "presumed first payment date" (at the beginning of the year following withdrawal); and the Seventh Circuit, in this case, has interpreted the Act to preclude interest prior to the date of withdrawal, but possibly to permit interest after that date.[12] Further review by this Court is warranted to resolve the conflict created by the disparate decisions of the courts of appeals.

2. The confusion that this disparate appellate authority has generated for plan administrators and contributing employers is manifest. The statutory calculations required by 29 U.S.C. 1399(c)(1)(A)(i) and

Pension Fund, 8 F.3d 810 (1993)(Table). The panel's summary affirmance has no precedential value in the Third Circuit.

[12] The arbitrators who have considered this question have also reached inconsistent results. Compare, *e.g.*, *Loomis Armored, Inc.* v. *Central States Pension Fund*, 8 Employee Benefits Cas. (BNA) 1899, 1920 (1987) (Tilove, Arb.) (allowing interest after calculation date) with *Carnation Co.* v. *Central States Pension Fund*, 9 Employee Benefits Cas. (BNA) 1409, 1448-1451 (1988) (Nagle, Arb.) (disallowing interest before date of actual withdrawal, but leaving unresolved whether interest is to be assessed from date of withdrawal to presumed first payment date).

(ii) must be made whenever a plan assesses withdrawal liability, and the answer materially affects the amounts employers may owe. Multiemployer plans may have contributing employers conducting business in several circuits. Those plans and employers are currently subject to at least two and perhaps three different rules for making the statutory calculations. See Central States, Southeast and Southwest Areas Pension Fund Amicus Br. at 4-5. Plans and their contributing employers cannot be certain how to apply the law, and they may find themselves involved in litigation in any of several jurisdictions operating under differing versions of the same substantive law.[13]

The conflict in the circuits places plan trustees in an especially awkward position, because they have a fiduciary duty to take appropriate steps to collect money owed to the plan. See 29 U.S.C. 1104(a)(1) (1988 & Supp. IV 1992). "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 571 (1985). The fiduciary duty established in ERISA for plan trustees extends to the collection of withdrawal liability. See 29 U.S.C. 1399(b)(1) (the plan "shall" demand payment of withdrawal liability); 126 Cong. Rec. 23,039 (1980) (state-

[13] After satisfying the requirements of mandatory arbitration, either the plan or the employer may bring an action in federal district court for an adjudication of the withdrawal liability dispute. 29 U.S.C. 1401(b)(2). Such actions may be brought "in the district where the plan is administered or where a defendant resides or does business." 29 U.S.C. 1451(d).

ment of Rep. Thompson) ("plan fiduciaries continue to be subject to the general standards for fiduciary conduct"). Because the circuits have reached inconsistent conclusions on the statutory interest question that this case presents, review by this Court is warranted in order to furnish guidance to plan trustees in the fulfillment of their fiduciary responsibilities under ERISA.

3. On the merits, the decision of the court of appeals in this case appears to be incorrect. The principal rationale given by the court of appeals is that it could find no provision of the Act that expressly authorizes "interest" for the year preceding the "presumed first payment" date. Pet. App. A17.[14] That rationale is incorrect.

Section 1399(c)(1)(A), read in context with Section 1399(c)(6), plainly requires that "interest" be added to an employer's withdrawal liability in calculating the

[14] The court of appeals was correct in noting that other provisions of MPPAA specifically call for the imposition of interest in somewhat related situations. For example, 29 U.S.C. 1399(c)(3) provides that "[i]f a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made"; 29 U.S.C. 1399(c)(5) provides that "[i]n the event of a default, a plan sponsor may require immediate payment of the outstanding amount * * *, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made"; and 29 U.S.C. 1399(c)(6) provides that interest charged under subsection (c) *(except under paragraph (1)(A)(ii) of that subsection)* is to be charged at the prevailing market rates for comparable obligations, until the date on which the payment is made. An employer's failure to make a withdrawal liability payment is treated as a delinquent contribution, for which double interest is a mandatory judicial remedy. 29 U.S.C. 1451(b), 1145, 1132(g)(2).

amortization period for the payment of that obligation. See pages 4-6, *supra*. The question is thus not *whether* the Act requires that "interest" be added. The question, instead, is *when* the interest begins to accrue—that is, whether the amortization schedule begins on the calculation date or on the presumed first payment date.[15]

a. Under Section 1399(c)(1)(A)(i), the employer's withdrawal liability is to be paid "over the period of years necessary to amortize the amount in level annual payments." The length of that amortization period (that is to say, the number of "level annual payments" needed to amortize the principal liability) is to be determined by adding interest on the unpaid amount of that liability at the rate assumed applicable in the "most recent actuarial valuation for the plan." 29 U.S.C. 1399(c)(1)(A)(ii). The Third Circuit correctly concluded in *Huber* that interest (at the rate assumed under the plan) must be added from the date of the initial liability calculation in order to "amortize" that liability. 916 F.2d at 98.[16]

[15] The court of appeals did not doubt that interest accrues on this liability *at some point*. The court, however, offered no statutory basis for its conclusion (Pet. App. A16) that interest may accrue *after* withdrawal. Section 1399(c)(1)(A)(ii) makes no distinction between pre-withdrawal and post-withdrawal interest; it merely requires that interest be included in the "determination of the amortization period." Indeed, the court did not even appear to be aware that Section 1399(c)(1)(A)(ii), especially when read together with 29 U.S.C. 1399(c)(6), provides express statutory authority for including that interest. See note 4, *supra*.

[16] Section 1399(c)(1)(A)(i) provides that an employer "shall pay" the "amount determined under section 1391" (as adjusted pursuant to specified provisions of MPPAA) "over the period of years necessary to amortize the amount in level annual

This becomes clear when one considers that the withdrawal liability that is calculated as of the end of the year preceding withdrawal represents the employer's share of the unfunded vested benefits that will be payable in the future, discounted to present value (as of the calculation date) at the assumed rate of interest under the plan. To take a simple example, if an employer withdraws from a plan only one year before the last unfunded benefit of $105 comes due, and if the assumed rate of interest under the plan is 5%, the present value of that unfunded liability one year earlier (as of the end of the plan year preceding withdrawal) would be $100. If interest, at the applicable plan rate, is not added back into the calculated deficiency *from the calculation date forward*, the amount paid by the employer a year later (at the presumed first payment date) would not "amortize" the deficiency. In this simple example, the payment required one year after the "calculation date" to make up the deficiency is $105 ($100 plus $5 interest), not $100. Under the interpretation of the Act adopted by

payments." This language is most naturally read to direct that the "amount" of the employer's liability be amortized from the date as of which that amount is calculated—namely, from the last day of the plan year preceding the withdrawal. Amortization from that date necessarily would include interest from the calculation date to the presumed first payment date. As the Third Circuit explained in *Huber*, by using the term "amortize"—and by indicating that the period of amortization commences with the calculation date (at the end of the plan year preceding withdrawal)—Section 1399(c)(1)(A)(i) structures the payment schedule in the form of an "immediate annuity," which includes both interest and principal in the first payment. 916 F.2d at 98; see generally S. Kellison, *The Theory of Interest* 58-62 (2d ed. 1991).

the court of appeals in this case, however, the plan would be paid only $100, and therefore would not receive a payment that "amortized" the deficiency.

Because the employer's withdrawal liability as of the "calculation date" represents its share of the discounted present value of the plan's unfunded vested benefits, it is necessary to *add back into* that liability the calculation interest that was removed in performing the present-value discount operation. Otherwise, the payment schedule will not "amortize" the liability, as Sections 1399(c)(1)(A)(i) and (ii) require.

b. As an alternative rationale, the court of appeals expressed the view that there is no basis for imposing interest on an obligation that did not exist until the moment of the employer's actual withdrawal. Pet. App. A17. The court of appeals is correct that an employer's withdrawal liability and payment obligation under Section 1399 do not arise until the date of its withdrawal. See, *e.g.*, *Godchaux* v. *Conveying Techniques, Inc.*, 846 F.2d 306, 311-313 (5th Cir. 1988). But that fact is irrelevant to the issue presented here —how the liability is to be calculated once the obligation *has* arisen. The withdrawal does not create the plan's underfunding. The underfunding preceded the withdrawal, and interest is charged on the employer's statutory share of that underfunding from the date as of which it is calculated. See *Huber*, 916 F.2d at 96 & n.25.[17] As the court below recognized,

[17] Although an employer that does not withdraw has no liability and payment obligation under Section 1399, such an employer (along with other employers contributing to the plan) does have a responsibility under the minimum funding standards in 26 U.S.C. 412 to make periodic contributions to the plan in order to eliminate any deficiency in the plan's standard funding account.

Congress selected the end of the year preceding withdrawal as the calculation date in order to spare plan actuaries the necessity of repeated plan valuations throughout the year; having done so, Congress provided that the amount, as so calculated, would be amortized over a period of years from that point forward.

c. The court of appeals expressed concern about the possibility that the employer might have made contributions during the part of the year before the withdrawal occurred, and that those contributions might have reduced the "true" amount of unfunded vested benefits as of the actual withdrawal date. See Pet. App. A17. That possibility cannot be wholly discounted. But it is also possible that the "true" amount of the plan's unfunded vested benefits will have *increased* between the beginning of the plan year and the date of the actual withdrawal. By requiring repayment of the unfunded amount of vested benefits as calculated at the end of the year preceding the date of withdrawal, the Act gives no more direct account of one possibility than of the other. The fact that Congress chose a date other than the date of withdrawal to make the liability calculation should, in any event, be dispositive. There is no basis for ignoring the date that Congress chose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Deputy Solicitor General

JUNE 1994

FILED
AUG 11 1994
OFFICE OF THE CLERK

No. 93-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 12, 1993
CERTIORARI GRANTED JUNE 27, 1994

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
NO. 88-CV-908

Date	Docket No.	Proceedings
8/29/88	1	**COMPLAINT**: Summons Issued.
8/29/88	2	Pltf's certificate of interest.
8/29/88	3	Pltf's response to Magistrate Consent Form.
9/16/88	4	Deft's certificate of interest.
9/16/88	5	**ANSWER** and counterclaim of defendant to vacate and modify arbitration award.
10/6/88	6	Pltf's reply brief to Deft's counterclaim.
10/11/88	7	Notice of status hearing set 10/26/88
10/21/88	8	Pltf's Motion for an Order to Confirm Arbitration Award P-ORDER.
10/21/88	9	Pltf's Supporting brief for motion for an Order to Confirm Arbitration Award

Date	Docket No.	Proceedings
10/26/88	10	**HEARING(RWW)** Status report/Conference call: Deft may file cross-motion for reduction of award; Deft to file brief & response to motion by 12/1/88; Pltf's reply brief due 1/9/89.
12/01/88	11	**STIP & ORDER(RWW)** that the Deft Milw. Brewery Workers Pension Plan shall have until December 15, 1988 to file its opposition brief to Pltfs' motion to confirm Arbitration Award; its motion to vacate the arbitrator's award and a supporting brief; The pltf's reply and opposition briefs are to be filed by January 24, 1989. Copy mailed to parties. E.O.D 12/02/88.
12/12/88		Received three boxes containing Transcripts and Exhibits from Boaz Siegel, arbitrator. (contents with the judge).
12/15/88	12	Deft's motion to vacate and modify arbitration award **D-VACATE**

Date	Docket No.	Proceedings
12/15/88	13	Deft's supporting brief to motion to vacate and modify arbitration award and in opposition to Pltfs' motion for an Order to confirm arbitration award. Exhibits A-R included.
1/23/89	14	Deft's motion for an Order assigning plaintiffs' motion to confirm the arbitration award ~~**D-ORDER.**~~
1/23/89	15	Deft's supporting brief to above motion.
1/24/89	16	**STIP & ORDER(RWW)** that the pltfs shall have until 2/7/89 to file a reply brief in support of their motion to confirm arbitration award.
2/7/89	17	Pltf's reply brief in support of their motion for an order to confirm arbitration award.
2/15/89	18	Notice of Oral arguments set 3/3/89
4/26/89	19	**ORAL ARGUMENTS(RWW)** court takes matter under advisement.
04/23/91	20	Pltf's LETTER to RWW respond to Deft's citation of recent decision in Huber v. Casablanca Industries, Inc..

Date	Docket No.	Proceedings
06/06/91	21	**DECISION & ORDER(RWW)**: this Court GRANTS IN PART and DENIES IN PART the parties' motions; this Court AFFIRMS the arbitrator's decision to deny the Plan's motion to dismiss; AFFIRMS the arbitrator's finding that the Plan required unanimous consent of all employers in order to adopt the direct attribution method of calculating Schlitz's withdrawal liability; AFFIRMS the arbitrator's finding that ERISA law does not impose a fiduciary duty upon a Plan's members when they decide whether to change the method of calculating withdrawal liability and VACATES the arbitrator's decision that the Plan improperly inclueded interest for the period between 12/31/80 and 01/01/82 in calculating Schlitz's payment scheduled. Copy mailed to parties. EOD:06/10/91.
06/06/91	22	JUDGMENT entered by Deputy Clerk. Copy mailed to parties. EOD:6/10/91.
06/20/91	23	Deft's MOTION to Amend Judgment. **D-AMEND JM**

Date	Docket No.	Proceedings
06/20/91	24	Deft's Brief in SUPPORT of Motion to Amend Judgment.
07/08/91	25	**STIPULATION & ORDER(RWW)**: that Pltfs shall have 60 days or until 09/01/91 in which to respond to Deft's Rule 59(e) Motion. Copy mailed to parties. EOD: 07/09/91.
08/28/91	26	**ORDER (RWW)**: That Plaintiff shall have an addition 30 days or until 10/01/91 in which to respond to Deft's Rule 59(e) Motion. Copy mailed to parties. EOD:08/29/91.
09/27/91	27	**ORDER (RWW)**: that Pltfs shall have an additional 30 days, or until November 1, 1991 in which to respond to Deft's Rule 59(e) Motion. Copy mailed to parties. EOD: 10/01/91.
10/30/91	28	**STIPULATION & ORDER (RWW)**: that Pltfs shall have an additional 30 days or until 12/01/91, in which to respond to Deft's Rule 59(e) Motion. Copy mailed to parties. EOD: 11/01/91.

Date	Docket No.	Proceedings
12/4/91	25	STIPULATION AND ORDER by Senior Judge Robert W. Warren: That the plaintiffs shall have an additional 30 days, or until 01/01/92, in which to respond to defendant's Rule 59(e) Motion. (cc: all counsel) (ctz) [Entry date 12/06/91] [Edit date 05/21/92]
12/13/91	26	STIPULATION AND ORDER by Senior Judge Robert W. Warren: IT IS HEREBY ORDERED that plaintiffs shall have an additional 30 days, or until 01/01/92 in which to respond to Defendant's Rule 59(e) motion. (cc: all counsel) (ctz) [Entry date 12/23/91]
1/2/92	27	BRIEF by plaintiff Jos Schlitz Brewing in RESPONSE to Defendant's Motion to AMEND JUDGMENT. [23-1](ctz)
1/10/92	28	REPLY BRIEF by defendant in support of motion to AMEND JUDGMENT. [23-1] (ctz)

Date	Docket No.	Proceedings
2/12/92	29	NOTICE OF ORAL ARGUMENT: Hearing setting on Motion to AMEND Judgment [23-1] at 9:00 on 4/10/92. (cc: all counsel) (ctz) [Entry date 02/13/92]
5/28/92	30	ATTORNEY APPEARANCE for defendant Milwaukee Brewery by Neil K. Quinn and Mary Ann Capron. (ctz)
5/28/92	31	HEARING MINUTES (RWW): Oral Arguement; Court takes matter under advisement, will issue decision by next Wednesday. (ctz) [Entry date 06/01/92]
05/28/92	32	STIPULATION AND ORDER by Senior Judge Robert W. Warren: It is hereby ordered that the law firm of Pretzel & Stouffer shall be substituted as counsel in this action for defendant Milwaukee Brewery Workers' Pension Plan. (cc: all counsel) (ctz) [Entry date 06/04/92]

Date	Docket No.	Proceedings
6/8/92	33	ORDER by Senior Judge Robert W. Warren granting in part the Plan's motion to AMEND JUDGMENT. [23-1] The Court orders the parties to attempt to arrive at an appropriate figure for the 1981 interest amount consistent with the Court's 6/6/81 Decision and Order. The parties should inform the Court in writing whether they were able to reach a resolution of the issue within 20 days of the signing of this Order. The Court also finds that the Plan is entitled to prejudgment interest at the prime rate from 7/7/88 on the 1981 interest amount. (cc: all counsel) (sln) [Entry date 06/05/92] [Edit date 11/27/92]
6/23/92	34	LETTER from plaintiff Jos Schlitz Brewing to Judge Warren requesting a hearing to be scheduled within the next 20 days. (ctz) [Entry date 06/24/92]

Date	Docket No.	Proceedings
6/25/92	35	NOTICE of hearing setting hearing on the appropriate dollar amount for the amended judgment [23-1] on 7/14/92 at 1:30 p.m. Briefs are due 7/8/92. (cc: all counsel) (sln) [Entry date 06/26/92]
7/9/92	36	ORDER by Senior Judge Robert W. Warren: Order requiring the parties to submit briefs on areas of dispute by 07/08/92 and setting a hearing on those matters for 07/14/92 is vacated. The parties are ORDERED to submit either an Agreed Order which reflects this Court's 06/03/92 Order or a Brief addressing any remaining areas of dispute by 07/20/92. In addition to setting forth the party's position on disputed issues in the Brief submitted, the parties should also address: whether a Court hearing is necessay; whether that hearing should be evidentiary or limited to legal argument and the length of time required for such a hearing. (cc: all counsel) (ctz) [Entry date 07/13/92]

Date	Docket No.	Proceedings
7/20/92	37	NOTICE as MEMORANDUM by plaintiff Jos Schlitz Brewing Regarding motion to Amend Judgment. (ctz) [Entry date 07/21/92]
7/20/92	38	MOTION by defendant Milwaukee Brewery for LEAVE to File Offer of Proof. (ctz) [Entry date 07/21/92]
7/20/92	39	NOTICE of Brief ADDRESSING Remaining Areas of Dispute by defendant Milwaukee Brewery. (ctz) [Entry date 07/21/92]
10/20/92	40	ORDER by Senior Judge Robert W. Warren that prejudgment interest shall accrue upon Schlit's overdue payments as of the date of each payment became due, for all payments owing after 7/7/88; and the order issued on 6/6/91 is a final order, and post-judgment interest should begin to accrue after that date (cc: all counsel) (amb) [Entry date 11/18/92]
11/17/92	42	JURISDICTIONAL STATEMENT by defendant Milwaukee Brewery (cc: all counsel) (amb) [Entry date 11/18/92] [Edit date 11/27/92]

Date	Docket No.	Proceedings
11/17/92	--	RECEIVED re [40-1] fee in amount of $ 105.00 (Receipt # 62499) (amb) [Entry date 11/18/92]
11/17/92	41	NOTICE OF APPEAL by defendant Milwaukee Brewery from Dist. Court decision [40-1] (cc: all counsel); parties notified. (amb) [Entry date 11/18/92]
11/18/92	--	SHORT RECORD Transmitted to USCA (cc: all counsel) parties notified (amb)
11/25/92	43	NOTICE OF CROSS APPEAL by plaintiff from Dist. court judgment 6/6/91; orders 6/8/92 and 10/20/92. (cc: all counsel) (sln) [Entry date 11/27/92]
11/25/92	44	JURISDICTIONAL STATEMENT by plaintiff re notice of cross appeal (cc: all counsel) (sln) [Entry date 11/27/92] [Edit date 11/27/92]
11/25/92	--	RECEIVED re [43-1] fee in amount of $ 105.00 from Whyte & Hirschboeck (Receipt # 62604) (sln) [Entry date 11/27/92]
11/27/92	--	SHORT RECORD Transmitted to USCA (cc: all counsel) (sln)

Date	Docket No.	Proceedings
12/22/92	46	MOTION by defendant Milwaukee Brewery for order to enlarge record on appeal (amb) [Entry date 12/28/92]
12/23/92	45	AFFIDAVIT/VERIFICATION of Mary Anne Capron, attorney for Millwaukee Brewery Workers, with regard to having the record expanded to include exhibits and transcripts from the arbitration; with attached certificate of mailing. (sln) [Entry date 12/24/92]
12/23/92	47	ORDER by Senior Judge Robert W. Warren granting motion for order to enlarge record on appeal [46-1] (cc: all counsel) (amb) [Entry date 01/06/93]
1/19/93	48	TRANSCRIPT filed. Taken on 5/28/92 on oral argument (ers) [Entry date 01/20/93]
1/19/93	49	TRANSCRIPT of proceedings taken 4/26/89 filed. (amb) [Entry date 01/22/93]

Date	Docket No.	Proceedings
4/16/93	--	RECORD on Appeal sent to 7th Circuit Court of Appeals re [43-1] and [41-1], USCA nos. 92-3811 and 92-3894 consisting of 1 vol. pleadings, 3 loose pleadings, 2 transcripts, 1 loose exhibit, and 3 boxes of exhibits. (cc: all counsel) (amb)
9/9/93	50	MANDATE/CERTIFIED COPY from Circuit Court of Appeals reversing and remanding the Decision of the District Court of [Appeal [43-1] with instructions to enforce arbitrator's award, affirming in part the decision of the District Court [41-1] Costs taxed in favor of Schlitz Brewing in the sum of $692.20. (kmm) [Entry date 09/13/93]
9/10/93	--	RECORD on appeal returned from U.S. Court of Appeals 92-3811 and 92-3894 consisting of 1 vol. of pleadings, 3 loose pleadings, 2 vols. of transcripts, 1 vol. of exhibits, 3 boxes of exhibits (returned to exhibit clerk). (kmm) [Entry date 09/13/93]

Date	Docket No.	Proceedings
9/14/93	51	MOTION by plaintiff Jos Schlitz Brewing for ORDER for Return of Amount of Judgment, Plus Interest at Rate Prescribed by MPPAA. (ctz)
10/20/93	52	ORDER by Senior Judge Robert W. Warren: The Judgment entered on June 6, 1991 (and amended by Orders entered on June 8, 1992 and October 20, 1992) is vacated; The arbitrator's award is affirmed in its entirety. Terminating case. (cc: all counsel) (ctz) [Entry date 10/22/93] [Edit date 03/01/94]

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT OF APPEALS FOR THE SEVENTH CIRCUIT NO. 92-3811 and 92-3894

Date	Proceedings
11/20/92	Private civil case docketed. [92-3811] [431794-1] Appearance form due on 12/21/92 for David C. Hertel, for James W. Greer, for Marc Gertner, for Maryanne H. Capron, for Neil K. Quinn, for Robert M. Chemers, for Michael G. Bruton. Transcript information sheet due 11/30/92 for Marc Gertner, for Maryanne H. Capron, for Neil K. Quinn, for Robert M. Chemers, for Michael G. Bruton. Appellant's brief due 12/30/92 for Milwaukee Brewery. (patb) [92-3811]
11/20/92	File Appellant Milwaukee Brewery jurisdictional statement. [92-3811] [431825-1] (patb) [92-3811]
11/30/92	Added attorney Barbara J. Janaszek per appearance form for Appellee Joseph Schlitz Brew, Appellee Stroh Brewery. (roxa) [92-3811]
11/30/92	Appearance form filed for Appellee Joseph Schlitz Brew, Appellee Stroh Brewery by attorney Barbara J. Janaszek, David C. Hertel, James W. Greet. [92-3811] [431794-1] (roxa) [92-3811]

Date	Proceedings
11/30/92	Appearance form filed for Appellant Milwaukee Brewery by attorney Robert M. Chemers, Michael G. Bruton. [92-3811] [431794-1] (roxa) [92-3811]
12/8/92	ORDER: The court orders these appeals [92-3811, 92-3894] CONSOLIDATED for purposes as follows: [434649-1] 1. Appellant's brief on main appeal is due 12/30/92 for Milwaukee Brewery in 92-3811. 2. Appellee's in main apl. and A's br. in xap. due 1/29/93 for Stroh Brewery in 92-3811, for Joseph Schlitz Brew in 92-3811, for Stroh Brewery in 92-3894, for Joseph Schlitz Brew in 92-3894. 3.Reply br. in main apl. and E's brief in xap. due 3/1/93 for Milwaukee Brewery in 92-3811, for Milwaukee Brewery in 92-3894. 4. Reply brief, if any, on cross-appeal due 3/15/93 for Stroh Brewery in 92-3894, for Joseph Schlitz Brew in 92-3894. (patb) [92-3811 92-3894]
12/22/92	Filed motion by Appellant Milwaukee Brewery in 92-3811, Appellee Milwaukee Brewery in 92-3894 to supplement record on appeal. [441610-1] [92-3811, 92-3894] (roxa) [92-3811 92-3894]

Date	Proceedings
12/23/92	ORDER issued re: MOTION TO SUPPLEMENT RECORD ON APPEAL. IT IS ORDERED that said motion will be HELD IN ABEYANCE pending appellant's submission of a copy of the district court's order on its motion to supplement the record, or upon submission of appellee's stipulation to supplement the record based on the parties' mutual representation that the materials with which appellant seeks to supplement the record were made a part of the record below. (chry) [92-3811 92-3894]
12/30/92	Filed 15c appellant's brief on main appeal by Milwaukee Brewery in 92-3811. [92-3811] [443459-1] (elea) [92-3811]
12/30/92	Filed 10c appendix by Appellant Milwaukee Brewery in 92-3811 [92-3811] [443461-1] (elea) [92-3811]
1/21/93	Appearance form filed for Appellant Milwaukee Brewery in 92-3811 by attorney Maryanne H. Capron, Robert M. Chemers, Michael G. Bruton. [431794-1] (roxa)_ [92-3811]
2/2/93	Brief deficiency letter sent to Appellee Joseph Schlitz Brew in 92-3811, Appellee Stroh Brewery in 92-3188. [434649-1] [92-3811, 92-3894] (trac) [92-3811 92-3894]

Date	Proceedings
2/5/93	Filed 15c appellee, cross-appellant's brief by Joseph Schlitz Brew and Stroh Brewery in 92-3811 and 92-3894, per order. [92-3811, 92-3894] [458040-1] (cfre) [92-3811, 92-3894]
2/5/93	Filed 10c appendix by Appellee Joseph Schlitz Brew and Stroh Brewery in 92-3811 92-3894, per order. [92-3811 92-3894] [458051-1] (cfre) [92-3811 92-3894]
2/5/93	Filed instanter motion by Appellee Joseph Schlitz Brew in 92-3811, Appellee Stroh Brewery in 92-3811, Appellant Joseph Schlitz Brew in 92-3894, Appellant Stroh Brewery in 92-3894 to file appellee's, cross-appellant's brief. [458120-1]. 15 copies appellee/cross-appellants brief and 10 appendix tendered. [458120-1] [92-3811, 92-3894] (kolb) [92-3811 92-3894]

Date	Proceedings
2/5/93	ORDER issued GRANTING instanter motion to file appellee's, cross-appellant's brief [458120-1] in 92-3811, 92-3894. The clerk of this court is directed to file instanter the tendered copies of the combined responsive brief in the main appeal and opening brief and appendix in the cross appeal. [92-3811, 92-3894] [458120-1] 1. Reply br. in main apl. and E's brief in xap. due 3/8/93 for Milwaukee Brewery in 92-3811, for Milwaukee Brewery in 92-3894 2. Reply brief, if any, on cross-appeal due 3/22/93 for Stroh Brewery in 92-3894, for Joseph Schlitz Brew in 92-3894 (grac) [92-3811 92-3894]
2/18/93	Filed oversize exhibit in Section 42 of exhibit room. Number of boxes: 1 [92-3811] [434694-1] (gina) [92-3811]
3/8/93	Filed 15c reply brief in main appeal and cross-appellee's brief by Milwaukee Brewery in 92-3811, in 92-3894. [92-3811, 92-3894] [466559-1] (patb) [92-3811, 92-3894]
3/23/93	Filed 15c appellant's reply brief in cross-appeal by Stroh Brewery in 92-3894, Joseph Schlitz Brew in 92-3894. [92-3894] [470594-1] (patb) [92-3894]
4/2/93	ORDER: Argument set for Friday, May 7, 1933 at 10:30 a.m. Each side limited to 30 minutes. [92-3811, 92-3894] [473920-1] (broo) [92-3811 92-3894]

Date	Proceedings
4/20/93	Orig. record on appeal filed. Contents of record: 1 vol. pleadings; 2 vol. transcripts; 1 volume, 3 boxes exhibits; 3 volumes loose pleadings. [92-3811, 92-3894] [480279-1] (chuc) [92-3811 92-3894]
4/29/93	Filed oversize exhibit in Section 61 of exhibit room. Number of boxes: 3 [92-3811] [434649-1] (gina) [92-3811]
5/7/93	Case heard and taken under advisement by panel: Chief Judge William J. Bauer, Circuit Judge Walter J. Cummings, Circuit Judge Frank H. Easterbrook. [92-3811, 92-3894] [487233-1] (broo) [92-3811 92-3894]
5/7/93	Case argued by Michael G. Bruton for Appellant Milwaukee Brewery in 92-3811, David C. Hertel for Appellee Joseph Schlitz Brew, Appellee Stroh Brewery in 92-3811, michael Bruton for Appellee Milwaukee Brewery in 92-3894, David C. Hertel for Appellant Joseph Schlitz Brew, Appellant Stroh Brewery in 92-3894. [92-3811, 92-3894] [431794-1] (broo) [92-3811 92-3894]

Date	Proceedings
5/10/93	ORDER: The Court, on its own motion, ORDERED from the bench at oral argument of 5/7/93, that the parties shall file simultaneous memoranda of law by 5/17/93 addressing this court's jurisdiction to hear this matter, specifically, whether a final judgment was entered in the district court. [92-3811, 92-3894] [434649-1] Court ordered action due 5/17/93 for Milwaukee Brewery, Schlitz Brewery, and Stroh Brewery in 92-3811 and 92-3894. (grac) [92-3811 92-3894]
5/17/93	Filed Appellee Stroh Brewery in 92-3811, Appellee Joseph Schlitz Brew in 92-3811, Appellant Stroh Brewery in 92-3894, Appellant Joseph Schlitz Brew in 92-3894 memorandum in response to this court's 5/10/93 order. [92-3811, 92-3894] [434649-1] (patb) [92-3811 92-3894]
5/21/93	Filed motion by Appellant Milwaukee Brewery in 92-3811, Appellee Milwaukee Brewery in 92-3894 to file supplemental brief. [493546-1] 10c of corrected supplemental brief on jurisdiction tendered. [493546-1] [92-3811, 92-3894] (patb) [92-3811 92-3894]

Date	Proceedings
5/26/93	ORDER issued GRANTING motion to file corrected supplemental brief on jurisdiction [493546-1] in 92-3811, 92-3894. The clerk of this court is directed to file instanter the tendered copies of the corrected supplemental brief of the defendant and distribute it to the assigned merits panel immediately. [92-3811, 92-3894] [493546-1] (patb)
	[92-3811 92-3894]
5/26/93	Filed Appellant Milwaukee Brewery in 92-3811, Appellee Milwaukee Brewery in 92-3894 10c corrected supplemental brief on jurisdiction as ordered by the court. [92-3811, 92-3894] [494255-1] (patb) [92-3811 92-3894]
6/22/93	Filed Appellant Milwaukee Brewery in 92-3811, Appellee Milwaukee Brewery in 92-3894 Citation of Additional Authority, per CR 28(j). Dist. [92-3811, 92-3894] [502467-1] (patb) [92-3811 92-3894]
8/13/93	Filed opinion of the court by Judge Easterbrook. AFFIRMED in part, REVERSED and this cause is REMANDED with instructions. Bauer, Cummings, Easterbrook [92-3811, 92-3894] [434649-1] (patb) [92-3811 92-3894]

Date	Proceedings
8/13/93	ORDER: Final judgment filed per opinion. Joseph Schlitz Brewing Company shall recover its costs in both appeals. [92-3811, 92-3894] [518376-1] (patb) [92-3811 92-3894]
8/31/93	Filed Appellee Stroh Brewery in 92-3811, Appellee Joseph Schlitz Brew in 92-3811, Appellant Stroh Brewery in 92-3894, Appellant Joseph Schlitz Brew in 92-3894 Bill of Costs in the amount of $692.20. [92-3811, 92-3894] [434649-1] (chuc) [92-3811 92-3894]
9/7/93	MANDATE ISSUED AND ENTIRE RECORD RETURNED: 1 vol. pleadings, 2 vol. transcripts, 3 vol. loose pleadings, 1 vol. exhibits and 3 boxes of exhibits. WITH BILL OF COSTS IN THE AMOUNT OF $692.20. [92-3811, 92-3894] [434649-1] (patb) [92-3811 92-3894]
9/13/93	Filed mandate receipt. [92-3811, 92-3894] [434649-1] (fern) [92-3811 92-3894]
9/13/93	Filed receipt for bill of costs. [92-3811, 92-3894] [434649-1] (fern) [92-3811 92-3894]
11/19/93	Filed notice from the United States Supreme Court of the filing of a Petition for Writ of Certiorari (Case No. 93-768). [92-3811, 92-3894] [434649-1] (cint) [92-3811 92-3894]

Date	Proceedings
7/5/94	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari limited to question 1. Supreme Court Case No.: 93-768. [92-3811, 92-3894] [619313-1] (cint) [92-3811 92-3894]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,

Plaintiffs,

Case No. 88-C-908

MILWAUKEE BREWERY WORKERS'
PENSION PLAN,

Defendant.

DECISION AND ORDER

This action involves the validity of a withdrawal liability assessment made by the Milwaukee Brewery Workers' Pension Plan ("the Plan") in 1981 against the Joseph Schlitz Brewing Company ("Schlitz") and its successor in interest, the Stroh Brewery Company. This Court originally deferred this matter to arbitration as required by 29 U.S.C. § 1401(a). Arbitrator Boaz Siegel rendered his award on August 24, 1988, holding that (1) Schlitz had instituted arbitration in a timely manner, (2) the Plan required unanimous consent of all employers in order to adopt the direct attribution method in calculating Schlitz's withdrawal

liability and therefore, because Schlitz had not consented to this method, it could not be assessed under the method and (3) Schlitz could not be assessed predemand interest. The Plan contends that each of these conclusions of the arbitrator is erroneous.

Now before the Court are (1) the Plan's Motion to Vacate and Modify the Arbitration Award and (2) Schlitz's Motion to Confirm the Award.

I. BACKGROUND

Between March 1, 1954 and June 1, 1981, Schlitz contributed to a multiemployer pension plan pursuant to successive bargaining agreements with the Brewery Workers' Local Union No. 9 ("Local 9"). In September 1981, Schlitz closed its Milwaukee brewery and withdrew from the Plan. The Plan assessed a withdrawal liability against Schlitz in the sum of $41,031,406. This assessment was calculated using a method known as the direct attribution method instead of the statutorily prescribed presumptive method. See 29 U.S.C. § 4211(b).

Schlitz disputed the assessment of its withdrawal liability under the direct attribution method and filed a lawsuit against the Plan. See Jos. Schlitz Brewing Company v. Pension Benefit Guaranty Corporation and Milwaukee

Brewery Workers' Pension Plan, et al., Case No. 82-C-0340. On December 28, 1984, this Court entered a Decision and Order dismissing that action and directing Schlitz and Plan to proceed with arbitration. The parties proceeded with arbitration.and selected Mr. Siegel as their arbitrator. On July 7, 1988, Mr. Siegel issued an initial opinion and award, primarily in favor of Schlitz. In his final award, the arbitrator ruled that the withdrawal liability of Schlitz, payable to the Plan, was $23,300,000.

II. SUMMARY OF THE ARBITRATOR'S AWARD

A. Arbitrator's Statement of the Facts

There is a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator are correct. 29 U.S.C. § 1401(c). The Plan has failed to establish by a clear preponderance of the evidence that any of the arbitrator's findings are incorrect. Thus, the Court adopts the arbitrator's findings of fact as summarized below.

1. The Milwaukee Brewers' Association

Blatz Brewing Co., Gettelman Brewing Co., Independent Milwaukee Brewery, Miller Brewing Co. ("Miller"), Pabst Brewing Co. ("Pabst") and Schlitz formed the Milwaukee Brewers' Association ("the Association") to

prepare for and negotiate the bargaining agreements with various local organizations, including Local 9. On October 28, 1958, the participating members of the Association agreed to a defined set of principles, rules and procedures (the "Association Agreement"). The Association Agreement contained eleven basic commitments, including the following:

> All decisions and actions taken by the Proprietors' Committee and by the Labor Committee shall be by unanimous vote of the respective committee, with each brewery having a reasonable opportunity to cast its vote on the question.

The Association Agreement also established the negotiating procedures which governs the conduct of the Association's Labor Committee. The procedures include the following:

> (1) All questions before the Labor Committee must be decided by unanimous vote of the members present. Every member shall be given adequate notice of all meetings.
>
> (2) No bargaining proposals shall be made or accepted without prior unanimous consent of Labor Committee members.
>
> (3) Any Labor Committee member may dissent, thereby requiring referral to the Proprietors' Committee; every effort shall be made to resolve disagreements and refer to the Proprietors' Committee only such matters as might involve major policy.

2. The Plan

The Plan was established and is maintained pursuant to successive collective bargaining agreements between Local 9 and Miller, Pabst and Schlitz. The brewing companies bargained jointly with Local 9 until January 21, 1981, when Schlitz gave notice of its withdrawal from multiemployer bargaining. In the 1981 labor negotiations with Local 9, Miller and Pabst negotiated jointly, and Schlitz negotiated alone.

The Plan Document sets forth that the Plan can only be amended by the "mutual agreement of the Union and the Employers." During the period from 1954 to 1979, the Plan was amended eleven times by the mutual agreement of the Union and all participating employers.

A Joint Committee, consisting of members appointed by Local 9 and the participating employers, operated and administered the Plan. Kenneth Mueller, President of Local 9, was Chairman of the Joint Committee. The Plan Document granted the Joint Committee the power necessary for proper administration of the Plan. However, the Joint Committee did not have the power to amend the Plan.

On January 16, 1981, the Plan's counsel discussed the implications of the Multiemployer Pension Plan Amendments

Act of 1980 ("the MPPAA") at a specially called meeting of the Joint Committee. At the Joint Committee's January 19, 1981 meeting, the Committee decided that the Plan's counsel should draft a letter for the Committee to send to Local 9 and the employers, notifying them of the fact of the new law. The letter advised Local 9 and the employers of the effect of MPPAA and indicated that the presumptive method of determining employer withdrawal liability would apply unless the Plan were amended.

3. The 1979 and 1981 Contract Negotiations Between The Association and Local 9

During the 1979 contract negotiations, a dispute arose among the members of the Association's Labor Committee regarding Local 9's wage demands. The representative from Schlitz claimed that the wage demands exceeded the President's guidelines and that no joint proposal in excess of the guidelines should be made. Miller and Pabst disagreed. The chief executive officers of the breweries met on May 23, 1979 to attempt to resolve the disagreement. They were unable to reach an agreement at the meeting.

On January 21, 1981, Schlitz gave timely notice to Miller, Pabst and Local 9 of its withdrawal from the Association and joint bargaining with the Brewery Proprietors.

Henceforth, Schlitz negotiated separately with Local 9. Notwithstanding its separate bargaining on all issues, Schlitz gave notice that it would maintain its representation on the Joint Committee and continue to participate in the Plan. Charles Mazza, the Schlitz representative on the Joint Committee, attended meetings of the Joint Committee until his resignation on September 14, 1981.

4. The 1981 Negotiations Between Miller, Pabst and Local 9

On May 20, 1981, the president of Local 9 notified Miller, Pabst and Schlitz of a meeting to be held on May 22, 1981 "for the purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan." Schlitz responded in a letter dated May 21, 1981. On May 22, 1981 and May 29, 1981, Miller, Pabst and Local 9 met and agreed to two memoranda of understanding (the "5/22 and 5/29 Memoranda") regarding the Plan. The Memoranda directed the Plan to employ the direct method instead of the presumptive method in the calculation of withdrawal liability. Miller, Pabst and Local 9 never proposed the 5/22 or 5/29 Memoranda to Schlitz. In addition, Schlitz and Local 9 never reached any agreement with respect to the subject matter of those memoranda.

On August 17, 1981, the Joint Committee directed the Plan's actuary to calculate the withdrawal liability of Schlitz based upon the 5/22 and 5/29 Memoranda. The actuary reported his results to the Joint Committee on September 15, 1981. On September 29, 1981, the Joint Committee sent a letter to Schlitz demanding payment of $41,031,406.

B. **The Arbitrator's Award**

As a preliminary matter, the arbitrator addressed two motions submitted by the Plan and the Plan's request for ruling regarding the burden of proof. The arbitrator denied the Plan's Motion to Dismiss the Arbitration Proceeding and granted the Plan's Motion to Limit Issues for Arbitration (to eliminate the issue of the constitutionality of the MPPAA). The arbitrator also ruled that 29 U.S.C. § 1401(a)(3)(A) provided the proper burden of proof in the arbitration action.

The arbitrator next found that the 5/22 and 5/29 memoranda did not amend the Plan so as to be applicable to Schlitz. Consequently, the Plan did not require use of the direct attribution method in the calculation of Schlitz's withdrawal liability. The arbitrator rejected the argument of the Plan that Pabst, Miller and Local 9 could adopt the direct attribution method without the agreement of Schlitz. The arbitrator held that the Plan requires unanimous agreement

among Local 9 and all the employers to be amended. The arbitrator stated that it is not proper to treat the Plan members as fiduciaries to allow the adoption of the direct attribution method without the agreement of all Plan members.

The arbitrator found that the interest rate assumption adopted by the Plan's actuary and used in the determination of the withdrawal liability of Schlitz was reasonable. He stated that the assumption offered the actuary's best estimate of anticipated experience under the Plan.

The arbitrator found that he lacked sufficient evidence to determine if the retirement age assumption used by the Plan actuary was reasonable. Consequently, he referred the question to the parties and their actuaries for further consideration and possible agreement.

The arbitrator held that the Plan's addition of interest for the year 1981 in calculating the payment schedule was incorrect under the MPPAA. The arbitrator stated that his ruling is supported by the clear statutory declaration that the payment schedule shall be determined as if the first payment is to be made on the first day of the plan year following withdrawal, which in this case would be January 1, 1982.

III. THE PLAN'S MOTION TO VACATE AND MODIFY THE AWARD

The Plan moves to vacate the arbitrator's award. The Plan first argues that the arbitrator erred in not dismissing the arbitration. The Plan asserts that Schlitz failed to initiate the arbitration within the time and manner required by law.

In the alternative, the Plan moves to vacate the award and reinstate the Plan's adoption of the direct attribution method of calculating withdrawal liability and its assessment of predemand interest. The Plan argues that vacation of the award and reinstatement of the Plan's determination is proper for the following reasons:

> (1) The arbitrator erred in not applying the statutory presumption in favor of the Plan's determination.
>
> (2) The arbitrator erred in finding that the Plan's requirement of "mutual agreement" meant unanimous agreement between Local 9 and all the employers.
>
> (3) The arbitrator erred in finding that the representatives of the Plan were not acting as ERISA fiduciaries when they amended the Plan to select the method of determining an employer's withdrawal liability.
>
> (4) The arbitrator erred in finding that the interest for the year 1981 was not to be included in the calculation of Schlitz's withdrawal liability.

A. **Standard of Review**

As stated above, 29 U.S.C. § 1401(c) requires that

this Court defer to the factual findings of the arbitrator. Section 1401(c) provides:

> (c) Presumption Respecting Finding of Fact by Arbitrator. In any proceeding under section (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence that the findings of fact made by the arbitrator were correct.

However, this Court is to review de novo the legal conclusions of the arbitrator. The Seventh Circuit in Chicago Truck Drivers Pension Fund v. Zahn Drug stated:

> Congress did intend that all legal determinations by the arbitrator be subject to de novo review. Consequently, the parties have the right to expect that the reviewing court will scrutinize fully the arbitrator's understanding of the legal principles.

890 F.2d 1405, 1411 (7th Cir. 1989) (emphasis in original).

This case also involves mixed questions of fact and law. With respect to these questions, the Seventh Circuit has held that courts should apply a "clearly erroneous" standard. See id.

B. **The Plan's Motion to Dismiss**

The arbitrator's decision with respect to the Plan's motion to dismiss involves a mixed question of fact and law, since the arbitrator applied ERISA law to a particular factual

situation. Accordingly, this Court shall apply the clearly erroneous standard of review to the arbitrator's decision.

In denying the Plan's motion to dismiss, the arbitrator found that a December 23, 1981 letter from Schlitz to the Plan, in combination with prior correspondences between the parties, met the requirements of 29 U.S.C. § 140l(a)(1)(B) and 29 U.S.C. § 1399(b)(2)(A).

Section 1401(a)(1)(B) provides:

> (a) Arbitration proceedings; matters subject to arbitration; procedures applicable, etc.
>
> (1) Any dispute between an employer and the Plan sponsor of a multi-employer plan concerning a determination made under 29 U.S.C. §§ 1381-1399 shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of --
>
> . . .
>
> (B) 120 days after the date of the employer's request under 29 U.S.C. § 1399(b)(2)(A).

Section 1399(b)(2)(A) provides:

> No later than 90 days after the employer receives the notice described in paragraph
>
> (1),[1] the employer --

> (i) may ask the Plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments.
>
> (ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and
>
> (iii) may furnish any additional relevant information to the Plan sponsor.

The Plan asserts that the December 21, 1981 letter fails to meet the requirements of § 1399(b)(2)(A) and therefore Schlitz failed to meet the requirements of § 1401(a)(1)(B). The December 21, 1981 letter is as follows:

> Brewery Worker's Pension Plan
> 2189 North 48th Street
> Milwaukee, Wisconsin 53208
>
> Attention: Katherine M. Roback, Secretary
>
> Dear Ms. Roback:
>
> In accordance with the procedures suggested in your letter dated December 3, 1981, we hereby request a determination by the Joint Committee of the employer withdrawal liability chargeable to Schlitz under the "presumptive method" for calculating such liability (under Section 4211(b) of the Employee Retirement Income Security Act of 1974, as amended

("ERISA")). We believe that the presumptive method is the only method which may correctly be applied to Schlitz under applicable law. The Joint Committee's determination of the Schlitz withdrawal liability under the presumptive method should identify any differences which may exist between the accounts of the liability as determined under the direct attribution method asserted by the Joint Committee to be applicable and the presumptive method. Therefore, we hereby specifically request from you the following:

1. A statement concerning the withdrawal liability of Schlitz under the presumptive method set forth in Section 4211(b) of ERISA and the underlying calculations.

2. The payment schedule applicable to Schlitz under the presumptive method and the underlying calculations.

3. The calculations used to determine the unfunded vested benefits of the Plan for purposes of determining Schlitz's withdrawal liability, and the actuarial assumptions and methods used in connection therewith have previously been furnished to us. If any changes to those calculations would result from the use of the presumptive method, then we request those calculations, as revised.

4. A statement concerning the Joint Committee's decision as to which method

of calculating employer withdrawal liability applies to Schlitz and an explanation of the basis for the decision.

Very truly yours,

JOS. SCHLITZ BREWING COMPANY

(signed)
H.L. Fe.

(Emphasis added).

The December 23, 1981 letter meets the requirements of § 1399(b)(2)(A) as set out in subsections (i) and (iii). The letter explicitly requests the Plan to review and submit a statement concerning the basis for its decision to employ the direct attribution method rather than the presumptive method. This request meets the requirements of subsection (i), that the employer ask the Plan sponsor to review a specific matter relating to the employer's liability. The letter also furnishes additional relevant information pursuant to subsection (iii) by stating: "[w]e believe that the presumptive method is the only method which may correctly be applied to Schlitz under applicable law."

Because this Court concurs with the arbitrator's decision with respect to the Plan's motion to dismiss, the

Court finds the Arbitrator's decision was not clearly erroneous.

C. Whether the Plan Required Unanimous Consent of All Employers in Order to Adopt the Direct Attribution Method of Calculating Schlitz's Withdrawal Liability

In determining whether unanimous consent was required to adopt the direct attribution method of imposing liability, this Court must address two issues: (1) whether the Plan requires unanimous consent to be amended and (2) if the Plan requires unanimous consent, whether ERISA overrides that requirement.

1. Whether the Plan Calls for Unanimous Consent

Whether the Plan requires unanimous consent to be amended presents a mixed question of fact and law because it involves the application of contract, ERISA and trust principles to factual circumstances. Consequently, this Court shall defer to the arbitrator's determination unless it is clearly erroneous.

Article IX of the Plan specifies that: "The Plan may be modified, altered or amended upon mutual agreement of the Union and the Employers... (emphasis added). The arbitrator held that the words "mutual agreement" mean

unanimous agreement. See Milwaukee Brewery Workers' Pension Plan and Schlitz Brewing Co., 9 EBC 2385, 2394 (1988). In support of his determination, the arbitrator notes that: (1) Black's Law Dictionary (3rd) Edition defines "agreement" as "the union of two or more minds in a thing done or to be done; a mutual assent to do a thing" and therefore the word "mutual" appears to be an inherent element of the word "agreement" and (2) all amendments to the Plan prior to those made on May 22 and May 29, 1981, were made by unanimous agreement between Local 9 and all the employers. See id.

The Plan asserts that the arbitrator's determination was incorrect because: (1) the arbitrator failed to apply the statutory presumption that the Plan's determination of this issue was correct; (2) when the parties intended that an act could be performed only by unanimous consent, they spelled out that requirement unambiguously; (3) the arbitrator's reference to the fact that all prior amendments were made by unanimous agreement does not prove that unanimous concurrence was required and (4) the arbitrator improperly avoided addressing a presumption against the requirement of unanimous agreement incorporated into ERISA law from the

common law of trusts. This Court shall address each of the Plan's arguments.

(a) The Arbitrator Failed to Apply the Statutory Presumption that the Plan's Interpretation of "Mutual Agreement" Was Correct

29 U.S.C. § 1401(a)(3)(A) provides that "any determination made by a plan sponsor . . . under 29 U.S.C. § 1381-1399[2] . . . is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." The Plan argues that Section 1401(a)(3)(A) requires that the arbitrator defer to the Plan's determination with respect to the meaning of the term "mutual agreement."

However, the Plants determination of the meaning of "mutual agreement," fails to pass muster even under the "unreasonable or clearly erroneous" standard. A fundamental rule of contract interpretation is that the words of a contract shall be given their ordinary and popularly accepted meanings in the absence of anything indicating that they were used in a different sense or that the parties intended some special colloquial meaning. 17A C.J.S. Contracts § 301. Webster's defines "mutual" as "entertained, proffered, or asserted by each with respect to the other of two or to each of the others of a group." See Webster's Third New International

Dictionary (Unabridged) (1961), p. 1493 (emphasis added). Given the common dictionary meaning of the word mutual, "mutual agreement" must mean agreement by each with respect to the other. The Plan's interpretation of "mutual agreement," as requiring merely agreement among some of the parties, violates the settled principle that a construction of a contract that renders some language useless or surplusage is to be avoided. See 17A C.J.S. Contracts § 297, p. 125.[3] The Plan's interpretation of "mutual agreement" would render the term "mutual" meaningless.

Because it is plain that "mutual agreement" requires agreement by all, the Plan's determination of the term as requiring agreement by less than all is clearly erroneous and unreasonable.

(b) When the Parties Intended that an Act Could be Performed Only by Unanimous Consent, They Spelled Out that Requirement Unambiguously.

The Plan next argues that when the parties intended that an act be performed only upon unanimous consent they spelled out that requirement unambiguously. The Plan notes that the Association Agreement required that all action be taken by "unanimous vote" and that a bargaining proposal could not be accepted without "unanimous consent." The

Plan states that, in view of this different language, it is evident that the parties intended something less than unanimity to amend the Plan.

The Plan's argument fails to persuade this Court. As stated above, the plain meaning of the word "mutual" implies that each member of the group is included. Consequently, the fact that the parties used the word unanimous in the Association Agreement and mutual in the Plan's articles does not indicate an intent to require a lesser agreement in the Plan's articles. Moreover, the Association agreement is separate and distinct from the articles of the Plan. Consequently, even if the terms "unanimous" and "mutual" may have slightly different meanings, the fact that the parties chose to use the word "unanimous" in one context and the word "mutual" in another does not demonstrate an intent to give different meanings to the two terms.

(c) The Fact that all Prior Amendments Were Made by Unanimous Consent Does Not Prove that Unanimous Concurrence Was Required.

Next the Plan argues that the arbitrator erroneously found that the fact that all prior amendments were made by unanimous consent proves that the Plan requires unanimous consent. This Court believes that the Plan misinterprets the

arbitrator. The arbitrator did not assert that this past practice proved that unanimous agreement was required. Rather, he merely stated that the Plan's past practice confirmed his interpretation. See Schlitz at 2394. Because this Court finds that the arbitrator correctly determined that "mutual agreement" clearly implies that all the parties were to agree, this Court need not address the question of whether the parties' past practices prove that unanimous concurrence was required.

(d) The Arbitrator Improperly Avoided Addressing a Presumption Against Unanimous Consent Incorporated into ERISA Law From the Common Law of Trusts.

Finally, the Plan argues that the arbitrator improperly avoided addressing a presumption against requiring unanimous agreement. The Plan states that this presumption was incorporated into ERISA law from the common law of trusts. In support of this assertion, the Plan cites Burud v. Acme Electric Co., Inc., 591 F. Supp. 238, 242 (D.C. Alaska 1984). The Burud court stated that:

> . . . Congress intended to incorporate into the ERISA common law of trust as it has evolved. Although it is unclear whether rule by the majority of the trustee committee has become the rule of decision in the majority of American jurisdictions, that rule is clearly

> the modern trend and is better suited to the management of business trusts in general and employee pension and welfare trusts in particular.

Id. at 245 (citations omitted and emphasis added).

The Burud court addressed the management of a pension plan and not its amendment. While it is clear that the trust and fiduciary model is appropriate for pension plan management, it is not clear that it is appropriate for the amendment of pension plans.

Moreover, the plan in Burud differs from that in our case. The Burud court observed that "the plan [in their case did] not expressly require actions taken by the trustees to be approved by unanimous vote . . . ." See id. at 242. In our case, the Plan clearly states that "mutual agreement" is required for amendment of the Plan.

Because this Court concurs with arbitrator's decision with respect to the meaning of "mutual agreement," the Court does not find that his holding was clearly erroneous.

2. Whether ERISA Overrides the Plan's Requirement of Mutual Assent

Whether ERISA law overrides the provision in the Plan which requires mutual agreement is a legal

determination. Accordingly, this Court will review de novo the arbitrator's decision with respect to this issue.

The arbitrator rejected the Plan's argument that the parties acted as fiduciaries and therefore were obligated to adopt the direct attribution method since it was in the best interest of the Plan participants and beneficiaries. See Schlitz at 2399. In rejecting the Plan's argument, the arbitrator relied upon the distinction between the administration or management and the amendment of a plan. See id. at 2396. The arbitrator held that Local 9 and the employers had a fiduciary duty with respect to the administration and management of the Plan and that they turned over this fiduciary duty to the Joint Committee. See id. The arbitrator found that the parties reserved power to amend the Plan to themselves and that this reservation of power was a collective bargaining power. See id. at 2397.

In its motion to vacate the arbitrator's award, the Plan argues that Schlitz, as a party to the Plan, had a fiduciary duty with respect to (1) amending the Plan in general and (2) amending the Plan to change the method of computing withdrawal liability.

(a). Schlitz's Fiduciary Duty With Respect to Amendment of the Plan

Although the Seventh Circuit has not addressed the issue, caselaw clearly holds that employers do not act as fiduciaries when they amend a plan.[5] In Amato v. Western Union International, Inc., the Second Circuit held that a company's officers "acted on behalf of a corporate employer and not as Plan fiduciaries in amending its pension plan." 773 F.2d 1402, 1417 (2d Cir. 1985) cert. denied, 474 U.S. 1113 (1986); see also Chait v. Bernstein, 645 F. Supp. 1092 (D.N.J. 1986), aff'd., 835 F.2d 1017 (3d Cir. 1987) (decisions of defendant to amend and terminate a pension plan are not governed by ERISA's fiduciary duties); Musto v. American General Corp., 861 F.2d 897, 911-912 (6th Cir. 1988) ("[t]he caselaw . . . makes it clear that when an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards." (emphasis added)).

The rationale for not imposing a fiduciary duty when an employer amends a pension plan becomes apparent when one examines the situations in which ERISA imposes a fiduciary duty. ERISA imposes a fiduciary duty upon those who exercise discretionary authority or control with respect

to the management or administration of a plan. See 29 U.S.C. § 1002(21)(A)[6]. ERISA law places upon plan administrators and managers a duty of loyalty not to engage in transactions in which they have a conflict of interest, see 29 U.S.C. § 1106 and a duty of care to act to the prudent man standard. See 29 U.S.C. § 1104. These duties are imposed because of the legitimate concerns that (1) plan administrators and managers will make decisions in their own best interests rather than the beneficiaries' best interests, (2) plan administrators and managers will not have proper concern when dealing with the money of others (the pension plan's beneficiaries) and (3) plan beneficiaries cannot properly monitor the activities of plan administrators and managers.

These concerns are not present when an employer or union bargains for or amends the terms of a plan. The law does not fear employers and unions acting in their own self-interest because each side can monitor the other's behavior and allowing the parties to reach a bargained for result leads to an efficient market allocation of resources. In fact, the law fears the imposition of a fiduciary duty in this context because it is likely that such a duty would discourage employers from creating pension plans. If ERISA told employers how much

they must contribute to pension plans, it is likely that many employers would refuse to set up plans.

The Musto court demonstrates the reluctance of Congress and the courts to impose a fiduciary duty where an employer negotiates for or amends a plan.

> There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary performing the first task, but not the second. As this court, speaking through Judge Celebrezze, declared . . .
>
> > "[n]either Congress nor the courts are involved in either decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are appropriately influenced by forces in the market place and, when appropriate, by legislation."
>
> Congress . . . "has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers" to amend pension plan provisions regarding unfunded condition benefits.

Musto at 911 (citations omitted and emphasis added).

In spite of the above case law which holds that employers do not have a fiduciary duty with respect to the amendment of a plan, the Plan cites several cases which it asserts support a contrary conclusion. These cases can be grouped into three categories: (1) those which hold that employers and unions have a fiduciary duty with respect to the administration and management of a plan or its assets; (2) those which involve a conflict of interest of an employer or union and (3) those which involve the amendment of something other than a pension plan. None of the cases cited by the Plan contradict the general rule that employers do not have a fiduciary duty with respect to the amendment of a plan.

(i) Cases Cited by the Plan Which Hold that Employers and Unions have a Fiduciary Duty with Respect to the Management or Administration of a Pension Plan.

The Plan cites two cases for the proposition that employers and union officials have fiduciary duties towards pension plans. The Plan first cites Freund v Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979), for the proposition that corporate officers are fiduciaries. However, the Freund court merely held that the officers were fiduciaries insofar as they acted as plan trustees or plan administrators.

See id. at 634-35. This case does not state that employers or their corporate officers always act as fiduciaries or that they act as fiduciaries when they amend a plan.

Next, the Plan cites Local Union 2134, U.M.W. v. Powhatan Fuel, Inc., 828 F.2d 710 (7th Cir. 1987). However, this case, like Freund, merely holds that an employer or union acts in a fiduciary role to the extent it manages or administers a plan.

(ii) Cases Cited by the Plan Which Involve Conflicts of Interest Claims

Plaintiffs next cites three cases which are different than this case because they involve claims of interest. The Plan first cites Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978). Eaves involved "unique circumstances" in which the defendant used his position in a profit sharing plan to convince the trustee to amend the plan so that the defendant could obtain control of the company's affairs. See id. 458-459.

> It is apparent that during his negotiations with the Eaveses surrounding the purchase of the company, Penn recommended to Glen R. Eaves, then the trustee of Glen's Profit--Sharing Plan, that the Plan invest large sums of money in company stock in order to finance the purchase-sale transaction. In rendering such advice, Penn sought and eventually

> obtained control of the company's affairs through his acquisition of legal title of all outstanding shares of stock. By virtue of his ownership, and his position as trustee of the New Plan, Penn became chairman of the board of directors, vice president and treasurer of the company and a member of the New Plan committee.

Eaves at 458. Thus, in Eaves there existed the possibility of self-dealing on the part of Mr. Penn. For this reason, the court imposed a fiduciary duty upon Mr. Penn.

The Plan next cites Brock v. Hendershott, 8 E.B.C. 1121 (D.C.S.D. Ohio 1987), aff'd, 840 F.2d 339 (6th Cir. 1988) for the assertion that a union agent is a fiduciary when he participates in the collective bargaining process by drafting of Plan documents. However, Brock, like Eaves involved the possibility of self-dealing. In Brock, the defendants owned significant interests in a company which received a percentage of the money spent by certain plans for dental services from a particular group of dentists. See id. at 1122. The court found that the defendants breached their fiduciary duties "by dealing with assets of the Plans not solely in the interest of the Plans' participants and beneficiaries, but rather for [their] own interests and for [their] own account." See id. at 1123.

Finally, the Plan cites Donovan v. Bierwirth, 680 F.2d 263 (2nd Cir. 1982). Donovan, like Eaves and Brock, involve the possibility of a conflict of interest. The Donovan court held that corporate officers who were also plan trustees breached their fiduciary duty to the plan when they failed to resign as trustees when their positions as corporate officers during a take-over bid came into conflict with their roles as trustees. Donovan at 276.

(iii) Cases Cited by the Plan which Involve the Amendment of Something Other than a Pension Plan

The Plan finally cites a Seventh Circuit case, The Chicago Board of Options v. Connecticut General Life Insurance Company, 713 F.2d 254 (7th Cir. 1983). However, in Connecticut General, the Seventh Circuit addressed the amendment of an annuity contract and not the amendment of a pension plan. See id. at 255.

(b). Fiduciary Duty With Respect to Changing the Method of Computing Withdrawal Liability

The Plan next asserts that, even if Schlitz does not owe a fiduciary duty with respect to amending the Plan, it is under such a duty concerning the method of computing withdrawal liability. In order to determine whether Schlitz is

under a fiduciary duty, this Court must decide whether the choice of the methods of computing withdrawal liability is an act of plan management or administration. Unfortunately, ERISA law does not define the terms administer and manage. Consequently, this Court cannot merely compare the definitions of those terms with the decision to change the method of computing withdrawal liability to determine if a fiduciary duty should be imposed.

However, this Court can determine whether a fiduciary duty is required by comparing the contexts in which ERISA imposes a fiduciary duty with those in which it does not impose such a duty. As stated above, ERISA law recognizes two roles of employers and unions with respect to pension plans. First, employers and unions act as fiduciaries with respect to the administration and management of pension plans. ERISA law imposes a fiduciary duty in this context in order to protect plan beneficiaries from possible self-interested dealings by plan administrators and managers. Second, employers and unions act in a bargaining and nonfiduciary role with respect to the negotiation and amendment of the terms of pension plans. ERISA law does not impose a fiduciary duty in this instance because it trusts that they will monitor each other's behavior.

This Court believes that the Employers and Local 9 acted in a role more similar to that of a negotiator than that of fiduciary when they chose to change the method of withdrawal liability for two reasons: (1) the choice of withdrawal liability does not affect total amount which the Employers owe to the Plan and (2) the choice does affect how liability is divided among the Employers.

First, the choice of the method of withdrawal liability does not affect the total unfunded liability of the Employers to the pension plan. Instead, the different methods of calculation merely shift responsibility for unfunded vested benefits among the Employers. Since the choice does not affect the overall amount of money owed to the pension plan, the Employers can be left to bargain among themselves over methods of withdrawal liability. There is no fear that they will choose a method which will help them but hurt the Plan. Because there is no fear of the possibility of a conflict of interest, there is no great need to impose a fiduciary duty upon them.

Second, the choice of method of withdrawal liability affects how liability for unfunded vested benefits is divided among the Employers. Since the amount of total unfunded vested benefits owed by the Employers to the Plan is fixed,

any increase in liability which a method may impose on one employer decreases the liability of the other employers. Thus, there exists a substantial concern that a group of employers will act in concert to change the method of withdrawal liability in order to shift their responsibility for unfunded vested benefits to another employer. In our case, there is a legitimate fear that Miller and Pabst may have acted together in order to impose some of their liability for unfunded vested benefits onto Schlitz. Moreover, the Plan's involvement in the amendment process does not alleviate this fear. Since the Plan did not act as Schlitz' representative at the amendment meetings, there is no reason to believe that the Plan protected Schlitz's interests.

The Court should note that the Plan cites an arbitration decision which holds that the choice of computing withdrawal liability is a part of a plan's administration. See Hertz Corp. and Commission Salesman, Drivers and Helpers, Local 187 Pension Fund, 4 EBC 1367, 1384 (1983). The arbitrator in Hertz held that the pension plan committee could adopt, without the consent of the union and the employers, an amendment using an optional method of calculating employer's annual withdrawal liability payments.

The arbitrator in Hertz relied heavily upon two factors when making his decision. First, the arbitrator noted under the plan in question, the administrative committee was given power to amend the plan. See Hertz at 1374. Section 8.7(o) of the Plan in question provided in part:

> **Powers and Duties.** In addition to any implied powers and duties which may be necessary to carry out the provisions of the Plan, the Committee shall have:
>
> . . .
>
> (o) . . . the power to amend the Plan at any time and from time to time to the same extent and with the same like force and effect as if amended by agreement between the Employers and the Unions, except that no action may be taken to increase the contribution commitment of any Employer
>
> . . .

The arbitrator later discounted the effect of the language excepting from the Committee's power the ability to increase the contribution and commitment of any employer. See id. at 1383.

The arbitrator next relied upon evidence that the Committee chose to change the method of computing withdrawal liability for administrative reasons. See id. at 1382 ("the Plan's actuary . . . testified that the Plan had the

kind of record-keeping problems foreseen by Congress, and for that reason the Plan chose the optional method provided in clause (II)"). Thus, in Hertz, the decision to change the method of calculating withdrawal liability affected the administration and management of the plan. By choosing the optional method, the pension plan committee reduced the plan's administrative costs and thereby helped the plan's beneficiaries.

In our case, neither of the above conditions considered by the arbitrator in Hertz are present. First the Plan does not contain a clause giving the administrators of the Plan the power to amend the Plan without the consent of all the employers. Second, the Plan provides no evidence that it changed the method of calculating withdrawal liability for - administrative reasons. Instead, the plan argues that the direct attribution method is superior to the presumptive method because it more fairly allocates liabilities among participating employers. See the Plan's Memorandum, p. 34 (the direct attribution method "has a basic and inherent fairness to it. Each Employer pays its liability based upon benefits accrued by its own employees."). It is possible that the direct attribution method is fairer towards the Employers than the presumptive method. However, ERISA law does not

address the issue of equity among employers. Rather, it imposes a fiduciary duty solely to protect the interests of plan beneficiaries. Since there is no evidence that the choice of the method of withdrawal liability affects plan beneficiaries in our case, it is not covered by ERISA's fiduciary duty.

D. Whether the Addition of Interest for the Year 1981 by the Plan in Calculating the Payment Schedule was Correct Under MPPAA

Schlitz withdrew from the Plan in September of 1981. Pursuant to 29 U.S.C. §§ 1391 and 1399, the Plan calculated the withdrawal liability of Schlitz as of December 31, 1980 and added interest from that date on to the unfunded vested benefits. The arbitrator found the addition of interest for the period between December 31, 1980 and January 1, 1982 to be unfounded under the MPPAA. The arbitrator's decision involved a purely legal determination concerning the meaning of § 1399. Consequently, this Court shall review his decision de novo.

29 U.S.C. § 1399 (c) sets forth the payment requirements for withdrawal liability:

> [A]n employer shall pay the amount determined under § 1391 . . . over the period of years necessary to amortize the amount in level payments determined under subparagraph

> (C), calculated as if the first payment were made on the first day of the Plan year following the Plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent Plan year. Actual payment shall commence in accordance with paragraph (2).

Schlitz argues that under this provision the Plan cannot properly charge it interest for the period from December 31, 1980 to January 1, 1982. The Plan argues that such interest is proper under this provision.

In determining whether it was proper for the Plan to add interest from December 31, 1980 to January 1, 1982, this Court must determine: (1) whether the Plan can properly charge Schlitz for interest pursuant to § 1399(c)(1), and (2) if the Plan can properly charge interest, whether that interest can date back to December 31, 1980.

1. Whether the Plan Can Properly Charge Schlitz Interest Pursuant to § 1399(c)(1)

Section 1399(c)(1) provides that an employer shall pay its withdrawal liability "over the period of years necessary to amortize the amount in level payments." (Emphasis added). The inclusion of the word amortize in this section makes clear that the Plan can properly charge Schlitz interest. Black's Law Dictionary defines "amortization" as follows:

> In accounting, the allocation (and charged to expense) of the cost or the basis of an intangible asset over its estimated useful life . . . . A reduction in a debt or fund by periodic payments covering interest and part of principal . . . an "amortization plan" for the payment of an indebtedness is one where there are partial payments of the principal and accrued interest, at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished.

Deluxe Black's Law Dictionary, 6th ed., p. 84, 1990 (emphasis added); see also Lommis Armored, Inc. and Central State's Pension Fund 8 E.B.C. 1899, 1920. Thus, the concept of amortization includes the payment of interest by the debtor.[7]

2. Whether the Plan Could Properly Charge Schlitz for the Interest Accrued Between December 31, 1980 and January 1, 1982

The Arbitrator determined that the Plan could not properly charge Schlitz for the interest which accrued between December 31, 1980 and January 1, 1982. In support of his determination, the Arbitrator stated:

> In substance, it appears to this Arbitrator that in view of the clear statutory declaration that the payment schedule shall be determined as if the first payment is to be made on the first day of the plan year following withdrawal, which,

> in this case would be January 1, 1982, in view of the fact that the statute makes no provision for the payment of interest except on overdue payments, it is not correct to assess pre-demand interest on a withdrawing employer . . .
>
> The critical point in the mind of this Arbitrator is that, although the statute requires the withdrawal liability to be calculated as of the end of the Plan year immediately preceding the year of withdrawal, the statute does not say that money is due at that time. Congress selected a logical date to be used for the calculation of withdrawal liability. However, Congress also provided a commencement date for the payment which is as if the first payment were made on the first day of the Plan year following the Plan year in which the withdrawal occurs.

Milwaukee Brewery Workers' at 2405 (emphasis added).

The arbitrator's interpretation is confusing. First, he interprets § 1399(c)(1) to provide that the plan's amortization schedule is to be determined as if the withdrawing employer is not required to make its first payment until the first day of the plan year following withdrawal ("as if the first payment is to be made on the first day of the plan year following withdrawal"). The arbitrator appears to have based his decision on this first interpretation. Next, the arbitrator states

that a withdrawing employer's liability is to be determined as if he failed to make his first payment until the first day of the following year ("as if the first payment were made on the first day of the Plan year following . . . withdrawal").

The arbitrator's differing interpretations of § 1399 (c)(1) are troubling because they lead to differing results concerning whether the Plan properly assessed Schlitz interest between December 31, 1980 and January 1, 1982. Under the arbitrator's first interpretation, no interest can be charged since the withdrawing employer is not obligated to commence payments until the first day of the year after withdrawal. Under the arbitrator's second interpretation, interest can be charged since the withdrawing employer is presumed not to have made its required payments until the first day of the year after withdrawal even though its obligation accrued prior to that date. This interest can relate back to the date as of which the withdrawal liability was calculated, in our case December 31, 1980. See Huber v. Casablanca Industries, Inc., 916 F.2d 85, 96 (3rd Cir. 1990).[8]

The plain language of § 1399(a)(1) reveals that the arbitrator's second interpretation statement is correct. Section 1399(c)(1) does not provide that the employer's payment schedule is to be determined as if the employer's first

payment is required to be made on the first day of the Plan year following withdrawal. Rather, it requires that the employer pay the amount of its withdrawal liability over an amortization schedule calculated as if the employer made its first payment on the first day of the Plan year following withdrawal. See § 1399(c)(1) ("calculated as if the first payment were made on the first day of the Plan year following . . . withdrawal"). Accordingly, the Plan is entitled to interest calculated from the date as of which withdrawal was calculated, December 31, 1980, to the first day of the Plan year after withdrawal, January 1, 1982.

In spite of the clear language of § 1399(c)(1), Schlitz argues that the imposition of interest is improper because (1) such interest will lead to a double assessment of interest against employers, (2) Congress rejected a proposed provision which would have allowed interest to be charged from the date of an employer's withdrawal and (3) such interest is inconsistent with § 1399(c)(4).

Schlitz first argues that the imposition of interest is improper because it would lead to a double assessment of interest against an employer. Schlitz notes that § 1399(c)(2) provides that an employer must begin payments within sixty days after the date the plan sponsor makes its demand. Since

§ 1399(b)(1) requires that a demand for withdrawal liability payments be made "as soon as practical," the timing of withdrawal may permit a demand letter to be issued and payments to begin prior to the conclusion of the Plan year in which the withdrawal takes place. This occurred in our case. At that point, any late payment will generate the accrual of an interest charge under § 1399(c)(3). In addition, a default by the employer will require an interest charge on the outstanding balance under § 1399(c)(5). Schlitz states that § 1399(c)(3) and (5) generate a double assessment of interest if interest is also included in the payment schedule during the year of withdrawal. See Casablanca Industries, Inc. v. U.F.C.W. Local 29 23 Giant Eagle Pension Fund, 7 EBC 2705, 2728 (1986) (Jaffe, ARB.) ("an interest charge would result in double assessment of interest against a withdrawing employer").

Schlitz is correct that under this Court's interpretation of § 1399(c)(1) a withdrawing employer may be charged both a penalty interest pursuant to § 1399(c)(3) and (5) and an interest charge pursuant to § 1399(c)(1). However, these two possible interest payments serve different functions. Interest charges pursuant to § 1399(c)(3) and (5) are penalty payments which accrue only if an employer fails to meet its obligation

to make payments. The interest pursuant to § 1399(c)(1) is not a penalty. Rather, it arises because of the amortization of an employer's withdrawal liability.

The interest charged under § 1399(c)(1) during the year of an employer's withdrawal is inexact and is likely to lead to a greater interest payment than would be charged under normal amortization schedules. However, this tendency to overcharge employers during the first year is not a penalty and does not punish employers who do not meet their obligations. In Huber, the Third Circuit noted:

> If the employer pays some quantum of interest not earned, that is fortuity not penalty. As the [Pension Benefit Guaranty Corporation] notes in discussing this very point, "Congress was interested in rough equity, not precision." Brief of Amicus PBGC at 36. An assumption that payments will begin on the first day of the following year after withdrawal -- not before and not after -- is just that sort of rough equity. In any event, an employer could avoid this possibility by withdrawing near the end of the plan year.

Huber at 99. Because the interest provisions of these sections serve different purposes, the possibility that an employer might face multiple interest charges is not a double penalty.[9]

Schlitz next argues that Congress made clear its intent not to require pre-demand interest by rejecting a proposed

provision which would have allowed interest to be charged from the date of an employer's withdrawal. Proposed ERISA section 4201(e)(5) provided that "interest shall be charged from the date of the withdrawal at rates based on prevailing market rates for comparable obligations in accordance with the regulations of the corporation." This proposed provision clearly provided that interest was to be charged from the date of an employer's withdrawal. However, § 1399(a)(1) also allows a plan to charge interest during the year of withdrawal. Moreover, the interest to be charged under § 1399(a)(1) relates back to the date of calculation, not just the withdrawal date. Consequently, the fact that Congress chose to enact § 1399(c)(1) instead of proposed § 4201(e)(5) provides no evidence that Congress intended to prevent the imposition of interest during the year of withdrawal.

Finally, Schlitz argues that assessing interest for the year of withdrawal is inconsistent with § 1399(c)(4). Section 1399(c)(4) provides:

> The employers shall be entitled to prepay the outstanding amount of unpaid annual withdrawal liability payments determined under paragraph (1)(c), plus any accrued interest, if any, in full or in part, without penalty.

(Emphasis supplied by Schlitz). Schlitz argues that if predemand interest is permitted, the words "if any" will be meaningless, as a withdrawn employer that chose to prepare its withdrawal liability under this section would invariably owe accrued interest. However, as the Third Circuit notes in Huber, this argument incorrectly assumes that the only type of prepayment to which § 1399(c)(4) refers is a payment made immediately upon receipt of the demand letter. See Huber at 99. "The employer may prepay the outstanding principal amount of withdrawal liability at any time during the amortization period, including at a point immediately after a scheduled payment, at which point all accrued interest has been paid." See id. Because § 1399(c)(4) covers situations other than those covered by § 1399(c)(1), this Court's reading of § 1399(c)(1) is consistent with § 1399(c)(4).

VI. SCHLITZ'S MOTION TO CONFIRM THE ARBITRATOR'S AWARD

Since Schlitz's motion addresses the same issues put forth in the Plan's motion, it is not necessary for this Court to separately address Schlitz's motion.

V. SUMMARY

Under the foregoing reasoning, this Court **GRANTS IN PART** and **DENIES IN PART** the parties' motions. This Court (1) **AFFIRMS** the arbitrator's decision to deny the Plan's motion to dismiss; (2) **AFFIRMS** the arbitrator's finding that the Plan required unanimous consent of all employers in order to adopt the direct attribution method of calculating Schlitz's withdrawal liability; (3) **AFFIRMS** the arbitrator's finding that ERISA law does not impose a fiduciary duty upon a Plan's members when they decide whether to change the methods of calculating withdrawal liability and (4) **VACATES** the arbitrator's decision that the Plan improperly included interest for the period between December 31, 1980 and January 1, 1982 in calculating Schlitz's payment schedule.

So **ORDERED** this 6th day of June, 1991, at Milwaukee, Wisconsin.

s/s_____
ROBERT W. WARREN
UNITED STATES DISTRICT JUDGE

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[1]The notice referred to as "described in paragraph (1)" is found in 29 U.S.C. § 1399(b)(1), which provides:

> As soon as practicable after an employer's complete or partial withdrawal, the Plan sponsor shall --
>
> (A) notify the employer of --
>
> (i) the amount of the liability and
>
> (ii) the schedule for liability payments, and
>
> (B) demand payment in accordance with the schedule.

[2]Sections 1381 to 1399 address an employer's withdrawal liability.

> [3]17A C.J.S. Contracts § 297 provides in part: A construction neutralizing, nullifying, or annulling one provision should not be adopted if the contract can be construed so as to give effect to all of its provisions, and a construction rendering a provision, term, or part meaningless, superfluous, useless, inextricable, or nugatory should be avoided.

(Emphasis added).

[4]The Plan also argues that requiring unanimous agreement is improper because it allows a single employer to veto an amendment agreed upon by Local 9 and the other Employers. While the ability to veto may be problematic in the context of plan management and administration where the parties act as fiduciaries, it is appropriate in the context of plan amendment where each party acts in a bargaining mode and protects its own interests. See infra.

[5]The Seventh Circuit has, however, addressed the question of whether an employer or union has a fiduciary duty when acting in a negotiating role. In United Ind. Flight Officers v. United Air Lines, the Seventh Circuit held that ERISA imposes no fiduciary duty where an employer or union is engaging in negotiation or collective bargaining. 756 F.2d 1262, 1268 (7th Cir. 1985) ("the duties imposed on a fiduciary are inconsistent with the demands of negotiation and collective bargaining").

[6]ERISA defines fiduciary in 29 U.S.C. § 1002(21)(A) as:

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

Because the parties did not render any investment advice for the Plan, subsection (ii) does not apply to our case. Subsections (i) and (iii) create a fiduciary duty in those who exercise discretionary authority or control respecting the management and administration of pension plans.

[7]Schlitz argues and the Arbitrator ruled that it is improper to assess pre-demand interest on a withdrawing

employer by virtue of the word "amortize." See Milwaukee Brewery Workers' at 2405. Schlitz and the Arbitrator are correct that the word amortize alone did not give the Plan the authority to assess pre-demand interest on Schlitz. However, the inclusion of the word amortize in § 1399(c) makes clear that the Plan can properly charge Schlitz interest for the time period over which the payment schedule is amortized.

Schlitz also argues that the statute makes clear when the Plan can properly charge interest. In support of this argument Schlitz cites § 1399(c)(2), (3), (4), (5) as well as §§ 1391 and 1396. While these sections do explicitly state that a plan can charge an employer interest in certain circumstances, the inclusion of the word amortize in § 1399(c)(1) make clear that the Plan can charge Schlitz interest in our case as well.

[8]"[W]hile the liability for unfunded vested benefits became accelerated on the date the employer withdrew, it did not magically appear on that date. Unfunded vested benefits are benefits which are 'promised and earned but not yet funded' as of the calculation date. '[T]he liability for UVBS represents a preexisting obligation on the employer's part, and is not simply 'incurred' as of the date of withdrawal.' Dur Art & Technicolor v. Motion Picture Local 702 Pension Fund, 10 EBC 1326, 1328 (S.D.N.Y. 1988). In other words, the unfunded vested benefit calculation represents an employer's share of the amount needed for a fund to break even as of the calculation date. Due to the time value of money, that amount will grow between the calculation date and the withdrawal date." Id. (footnotes omitted and emphasis in the original).

[9]In its reply brief, Schlitz notes that a court in the Southern District of New York remanded a case similar to

ours to the magistrate to determine whether a double payment situation existed." See Du Art Film Laboratories v. Motion Picture Local 702 Pension Fund, 10 EBC 1326, 1328 (S.D.N Y. 1988). In Du Art, the possibility existed that the employer was paying both its regular contributions and an amount for its withdrawal liability for the same period of time. This situation involved a true double payments situation since an employer is required to pay either its regular contributions or a part of its withdrawal liability. In contrast, Schlitz could, at most, be required to pay two different types of interest pursuant to its withdrawal liability.

MILWAUKEE BREWERY WORKERS'

PENSION PLAN

AS AMENDED*

* Includes	Amendment I	-	effective 3/1/54
	Amendment II	-	effective 1/1/56
	Amendment III	-	effective 6/1/59
	Amendment IV	-	effective 6/1/64
	Amendment V	-	effective 6/1/67
	Amendment VI	-	effective 6/1/69
	Amendment VII	-	effective 6/1/71
	Amendment VIII	-	effective 6/1/73
	Amendment IX	-	effective 6/1/75
	Amendment X	-	effective 6/1/77
	Amendment XI	-	effective 6/1/79

WHEREAS, the Milwaukee Brewery Workers' Pension Plan, established March 1, 1954, by an agreement dated August 16, 1954, between the undersigned parties, provides in Article IX that the Plan may be modified, altered, or amended upon mutual agreement of the parties thereto, pursuant to which the Plan has heretofore been amended, effective March 31, 1954, January 1, 1956, June 1, 1959, June 1, 1964, June 1, 1967, June 1, 1969, June 1, 1971, June 1, 1973, June 1, 1975 and June 1, 1977.

WHEREAS, a further amendment to said Plan is deemed advisable,

NOW, THEREFORE, this Agreement provides that the Milwaukee Brewery, Workers' Pension Plan is amended in its entirety June 1, 1979 by replacing it with the Plan hereto attached.

FOR BREWERY WORKERS
LOCAL UNION NO. 9,
D.A.L.U., AFL-CIO:

FOR THE EMPLOYERS:

MILLER BREWING COMPANY
BY s/s
BY s/s Kenneth Mueller
Committee Member

PABST-BREWING COMPANY
BY s/s
BY s/s John Adams
Committee Member

JOS. SCHLITZ BREWING COMPANY
BY s/s
Committee Member

BY s/s H. L. Fessler
BY s/s
Committee Member

Dated 7-29-80

MILWAUKEE BREWERY WORKERS PENSION PLAN

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MILWAUKEE BREWERY WORKERS' PENSION PLAN

ARTICLE I DEFINITIONS

The following words and phrases whenever used herein are defined as follows:

1.01 Accrual Service. "Accrual Service" means the sum of any Past Service and of any Future Service for Benefits for which credit is provided under 2.01 and 2.05, respectively.

1.02 Act. "Act" means the Employee Retirement Income Security Act of 1974, as in effect from time to time.

1.03 Actuarial Equivalent. "Actuarial Equivalent" means a benefit of equivalent value when computed on the basis of actuarial tables and rates of interest applicable to this Plan as selected by the Plan Actuary.

1.04 Bargaining Unit. "Bargaining Unit" means the group or groups of persons represented by the Union and covered by the 1953 Collective Bargaining Agreement or any successor collective bargaining agreement between the Union

and a signatory, or signatories, of the 1953 Collective Bargaining Agreement.

1.05 Employee. "Employee" means any person who is hired by an Employer before his 60th birthday and who on or after March 1, 1953 shall have been or shall be:

(a) employed by an Employer in the Bargaining Unit, or

(b) on the seniority list of an Employer established for such Bargaining Unit.

Any person in the Bargaining Unit, employed by an Employer, who was placed on leave of absence by such Employer because of illness shall be considered an Employee only if such leave commenced on or after March 1, 1951.

1.06 Employer. "Employer" means an employer:

(a) which is a party to the 1953 Collective Bargaining Agreement or any successor collective bargaining agreement between the Union and a signatory, or signatories, of the 1953 Collective Bargaining Agreement, and

(b) which at the time shall be making contributions to the Fund in accordance therewith.

If an Employer has more than one place of business, the term "Employer" shall only apply to the place or places of business covered by a collective bargaining agreement requiring contributions to the Plan.

1.07 Effective Date. "Effective Date" means March 1, 1954.

1.08 Fund. "Fund" means the fund established by contributions made by the Employers in accordance with the provisions of Article VI hereof.

1.09 Joint Committee. "Joint Committee" means the committee provided for in accordance with Article XII hereof.

1.10 1953 Collective Bargaining Agreement. "1953 Collective Bargaining Agreement" means the collective bargaining agreement dated July 28, 1953 between the Union and the Brewery Proprietors of Milwaukee, Wisconsin.

1.11 Pensioner. "Pensioner" means any person whose employment with an Employer was terminated by death or otherwise and who at the time of such termination met the necessary age and service eligibility requirements to qualify himself or his spouse for a benefit under the provisions of the Prior Plan.

1.12 Plan. "Plan" means the Milwaukee Brewery Workers' Pension Plan.

1.13 Plan Actuary. "Plan Actuary" means an individual appointed by the Joint Committee who is an enrolled actuary under the Act and a member of the American Academy of Actuaries or a member of a firm of consulting actuaries, one or more of the members of which is a member of the American Academy of Actuaries, to perform the usual duties of actuary in connection with the administration of the Plan, including determination of the range of possible Employer contributions, and to provide such other services as may be required by the Joint Committee.

1.14 Prior Plan. "Prior Plan" means the plan which is replaced, effective June 1, 1977, by the plan set forth herein.

1.15 Trustee. "Trustee" means the bank or banks or trust company or trust companies designated in accordance with Article XI hereof to hold and invest the Fund and to pay benefits, fees and expenses as authorized by the Joint Committee.

1.16 Union. "Union" means Brewery Workers Local Union No. 9, D.A.L.U., AFL-CIO.

1.17 Vesting Service. "Vesting Service" means the sum of:

(a) any Past Service determined under 2.01, and

(b) any Future Service for Vesting for which credit is provided under 2.03.

ARTICLE II SERVICE

2.01 Past Service. Past Service shall be credited to each Employee who is in the employ of an Employer on or after June 1, 1977 equal to "Vesting Service" and "Accrual Service" accrued to January 1, 1978 as those terms are defined and to which such Employee is entitled under the applicable provisions of the Plan as in effect on May 31, 1977 or would have been entitled if such provisions had continued in effect, except that in computing such "Accrual Service", the table set out in 2.05 hereof (but not the definition of Hour of Work) shall be used in determining "Future Service for Benefits" for calendar year 1977.

2.02 Hour of Work. An Employee shall be deemed to have completed an Hour of Work for purposes of 2.03 and 2.04 for each hour for which the Employee is directly or indirectly compensated, or entitled to be compensated, by the Employer:

(a) for the actual performance of work,

(b) other than for the actual performance of

work if such hour is within a customary work period and within -

(1) a holiday or vacation for which the Employee receives pay, as provided for in the then current collective bargaining agreement between the Union and his Employer,

(2) a period during which an Employee is disabled and unable to work because of a physical or mental disability resulting from an industrial injury or sickness suffered in the employment of an Employer and compensable under the Worker's Compensation Act, or

(3) the initial 501 hours of any other continuous period during which the Employee performs no work, except an hour for which such compensation is required in order to comply with an unemployment compensation or disability insurance law.

In addition, an Employee shall be deemed to have completed an Hour of Work for each other hour, if any, for

which back pay is awarded or agreed upon and for each hour within a customary work period and within a period for which the Employee as a member of the Union is granted leave of absence to perform service for the Union in accordance with the then current collective bargaining agreement between the Union and the Employer.

Further, if an Employee left the employ of an Employer to enter the armed forces of the United States under circumstances entitling the Employee to reemployment rights under applicable law and returns to the employ of his former Employer during the period within which his reemployment rights are guaranteed by law, to the extent the Employee would have performed work for the Employer had he not entered the armed forces the Employee shall be deemed to have completed an Hour of Work for each hour within a customary work period which is during the Employee's period of service in the armed forces and during the period

after his discharge from such armed forces during which his reemployment rights are guaranteed by law.

Each Hour of Work shall be attributed to the period in which the work is performed or to which the compensation relates.

2.03 Future Service for Vesting. For purposes of the Plan, an Employee who accrues 1,000 Hours of Work or more in the calendar year ending on December 31, 1978 or in any calendar year thereafter, shall be credited with a year of Future Service for Vesting; except that the amount of Future Service for Vesting credited in any calendar year shall not be less than the fraction of a year of Future Service for Benefits as described in 2.05 credited for such year.

2.04 One Year Break in Service. For purposes of the Plan, completion of less than 500 Hours of Work in the calendar year ending on December 31, 1978 or in any calendar year thereafter shall be deemed a One Year Break in Service.

2.05 Future Service for Benefits.

(a) General Rule. Future service for Benefits shall be credited to an Employee for each calendar year after December 31, 1977 based on Hours of Work which accrue while an Employee is employed by an Employer in the Bargaining Unit, on the following basis:

Hours of Work	Portion of a Year's Future Service for Benefits Credit
1,000 or over	.0
800 or over but less than 1,000	.8
600 or over but less than 800	.6
500 or over but less than 600	.5
less than 500	None

(b) Special Rule for Employees Who Terminate At or After Age 65 and On or After June 1, 1979. In the event that an Employee's employment with the Employer terminates on or after June 1, 1979, and on or after his 65th birthday, the last year or portion of a year of Future Service for Benefits which shall be credited to the Employee shall be for the later of the calendar year 1979 or the calendar year of the

Employee's 65th birthday. Future Service for Benefits for such calendar year shall be determined in accordance with the schedule set forth under (a) of this 2.05 and shall be based on the Hours of Work which accrue while an Employee is employed by an Employer in the Bargaining Unit and prior to the later of May 31, 1979, or the last day of the month of the Employee's 65th birthday, and shall also be based on the Hours of Work attributable to all periods of vacation:

(1) which were accrued on the December 31 immediately preceding the later of May 31, 1979, or the last day of the month of the Employee's 65th birthday and were not compensated prior to such day,

(2) which accrued in the later of calendar year 1979 or the calendar year of the Employee's 65th birthday and were accrued prior to the later of May 31, 1979 or the last day of the month of the Employee's 65th birthday, or

(3) which were to the credit of the Employee in the vacation bank on the later of May 31, 1979, or the last day of the month of the Employee's 65th birthday.

2.06 Reemployment On or After January 1, 1977.

(a) Cancellation of Service. If an Employee's employment with the Employer is terminated on or after January 1, 1977 and before he has accrued at least ten years of Vesting Service, all of his Vesting Service and Accrual Service shall be cancelled. If he is later reemployed by an Employer, such cancelled Vesting Service and Accrual Service shall be reinstated on the earlier of:

(1) the date he completes 1,000 Hours of Work in the calendar year in which such reemployment occurs or in a later calendar year, if the Vesting Service so cancelled exceeds the number of calendar years immediately preceding the calendar year in which such reemployment occurs in which he has One Year Breaks in Service, or

(2) the date on which such reemployment occurs, if the Employee is employed:

(A) within three months after the date of his quit,

(B) within one year after the date of his discharge, or

(C) within three years after the date of his layoff.

(b) Prior Plan Service Credited. If an Employee who terminated employment with the Employer prior to June 1, 1977 is reemployed by an Employer on or after that date, and if under the provisions of Section 3 of Article II of the Milwaukee Brewery Workers' Pension Plan effective June 1, 1973 the Employee would have been entitled to add his "credited service" as defined in such provisions to service credited to him after reemployment had such provisions continued in effect, such "credited service" shall be Past Service under this Plan.

(c) Benefits Under Provisions of Prior Plan. Benefits for which an Employee is eligible under the provisions of the Plan set out herein shall be reduced by the Actuarial Equivalent of any benefits paid (other than benefits payable as a result of total and permanent disability) or payable to him under the Prior Plan and based on his Accrual Service.

(d) Benefits Following Reemployment. If an Employee terminates employment with an Employer on or after June 1, 1979 and is thereafter reemployed by the Employer, the amount of benefits, if any, under (b) of either 3.01, 3.02, 3.03, 3.04, 3.05, 3.06, 3.07, or 3.08 for which he or his spouse or designated co-pensioner may thereafter become eligible under the Plan shall be determined by applying all of the Plan provisions except that the portion of his benefit attributable to Accrual Service accrued prior to the date of such termination shall be based on the rate in such (b) in effect on such date.

2.07 Transfers.

(a) Transfer Out of Bargaining Unit. If an Employee is or has been transferred out of the Bargaining Unit, he shall continue to accrue Vesting Service (but not Accrual Service) as long as he remains an employee of an Employer outside the Bargaining Unit. If such Employee terminates employment with such Employer while out of the Bargaining Unit, his eligibility for a benefit under Article III of the Plan shall be determined as follows:

(1) Eligibility for the Normal, Vested and Early Retirement Benefits shall be based upon whether the Employee satisfies the eligibility conditions for such a benefit at the time his employment terminates.

(2) Such an Employee shall not be eligible for the Disability Retirement, Incentive Retirement and Early Retirement Supplemental Benefits.

(3) Eligibility for the Surviving Spouse Automatic and Designated Co-Pensioner

Benefits shall be based upon whether the Employee satisfies the eligibility conditions for such benefits at the time he transferred out of the Bargaining Unit.

Further, the amount of benefits, if any, for which the Employee or his spouse or designated co-pensioner may be eligible shall be determined on the basis of such provisions of the Plan as are in effect at the time of the Employee's transfer out of the Bargaining Unit.

(b) Transfers into Bargaining Unit. If a person employed by an Employer outside of the Bargaining Unit is or has been transferred into the Bargaining Unit, he shall be given Vesting Service (but not Accrual Service) for his prior period of employment with an Employer on the same basis as would have applied if he had been an Employee.

ARTICLE III BENEFITS

3.01 Normal Retirement Benefit.

(a) An Employee whose employment with an Employer as herein defined shall have been or shall be terminated on or after June 1, 1979 and on or after his 65th birthday shall be eligible, as determined under the provisions of 10.01, for a Normal Retirement Benefit (subject to any reduction required by the provisions of (b) of 4.01).

(b) The monthly amount of the Normal Retirement Benefit payable in accordance with (a) of 4.01 for an Employee eligible therefor under (a) of this 3.01 shall be the product of $16.00 multiplied by his years of Accrual Service at the time of termination of employment.

3.02 Disability Retirement Benefit.

(a) An Employee whose employment with an Employer as herein defined shall have been or shall be terminated on or after June 1, 1979 and prior to his 65th birthday because of Total and Permanent Disability as defined in Article V hereof commencing after he has completed ten or more years of Accrual Service hereunder shall be eligible,

upon filing with the Joint Committee such proof of his Total and Permanent Disability as the Joint Committee may require and as determined under the provisions of such Article V, for a Disability Retirement Benefit (subject to any reduction required by the provisions of (b) of 4.01).

(b) The monthly amount of the Disability Retirement payable in accordance with (a) of 4.01 for an Employee eligible therefor under (a) of this 3.02 shall be $16.00 multiplied by his years of Accrual Service at the time of such termination of employment; provided that the amount of such monthly benefit payable prior to age 65 shall be reduced in any event by:

(1) any Workmen's Compensation payments (except fixed statutory payments for the loss of any bodily member), but only during the period of time for which such payments are applicable, and

(2) any disability benefits under any program or plan under a collective bargaining agreement

between the Union and his Employer or any fund created by legislative enactment to which his Employer contributes (except total and permanent disability benefits which may be provided under the Social Security Act as amended from time to time or under any equivalent State Law providing benefits of a similar nature to the Employee), but only during the period of time for which such disability benefits are applicable.

3.03 Vested Retirement Benefit.

(a) An Employee who is not eligible for a Disability Retirement Benefit and whose employment with an Employer as herein defined shall have been or shall be terminated on or after June 1, 1979 but prior to his 65th birthday and after he has completed ten or more years of Vesting Service hereunder, shall be eligible, as determined under the provisions of 10.01, for a Vested Retirement Benefit upon attainment of his 65th birthday (subject to any reduction required by the provisions of (b) of 4.01).

(b) The monthly amount of the Vested Retirement Benefit payable in accordance with (a) of 4.01 for an Employee eligible therefor under (a) of this 3.03 shall be the product of $16.00 multiplied by his years of Accrual Service at the time of termination of employment.

3.04 Early Retirement Benefit.

(a) An Employee who has completed ten or more years of Accrual Service hereunder and is not eligible for a Disability Retirement Benefit in accordance with the provisions of 3.02 and whose employment with an Employer as herein defined shall have been or shall be terminated on or after June 1, 1979, may elect, by written notice to the Joint Committee, to have his Vested Retirement Benefit paid instead as an Early Retirement Benefit on a reduced basis as provided in (b) of this 3.04 to commence on a date which is on or after his 55th birthday and prior to his 65th birthday, in which case he shall be eligible, as determined under the

provisions of 10.01, for such benefit upon survival to the date elected for commencement of his Early Retirement Benefit.

(b) The Early Retirement Benefit payable to an Employee eligible therefor in accordance with (a) of this 3.04 shall be a monthly benefit equal to the monthly amount of Vested Retirement Benefit to which he would otherwise be eligible after his 65th birthday, subject to the following reductions:

(1) For each monthly benefit payable prior to the date the Employee attains the age of sixty-five, the monthly benefit for which he would otherwise be eligible shall be reduced by 1/240 for each calendar month not in excess of 60 and by 1/400 for each such month in excess of 60, by which the date of commencement of his Early Retirement Benefit precedes the date such benefit would have commenced had he continued in the employment of the Employer until his 65th birthday and terminated employment on that day.

(2) For any Employee who terminates employment with the Employer after he attains the age of fifty-five, any monthly benefit for which he is eligible after he attains the age of sixty-five shall be equal to the monthly benefit for which he was eligible in the calendar month immediately prior to the calendar month in which he attained the age of sixty-five increased by an amount which is 100% of the reduction determined in (1) of this (b).

3.05 Incentive Retirement Benefit.

(a) An Employee who has filed written notice with the Joint Committee to have his Vested Retirement Benefit paid as an Early Retirement Benefit commencing on the first day of the calendar month immediately following termination of employment with the Employer, shall be eligible, as determined under the provisions of 10.01, for an Incentive Retirement Benefit in addition to any benefit for which he may be eligible in accordance with 3.03 and 3.04, provided such termination of employment occurs:

(1) before the Employee has attained his 65th birthday;

(2) before he is eligible for a Disability Retirement Benefit in accordance with 3.02;

(3) after' he has attained his 55th birthday;

(4) after he has completed at least ten years of Accrual Service;

(5) on or after June 1, 1977; and

(6) while he is employed by the Employer in the Bargaining Unit.

An Employee will not be eligible for an Incentive Retirement Benefit based on a termination of employment while he is employed by the Employer outside the Bargaining Unit or unless a benefit is payable under the Plan on the first day of the calendar month immediately following termination of employment with the Employer.

(b) The Incentive Retirement Benefit payable to an Employee eligible therefor in accordance with (a) of this 3.05 shall be a benefit of $105 per month.

3.06 Early Retirement Supplemental Benefit.

(a) An employee whose employment with an Employer as herein defined shall have been or shall be terminated on or after June 1, 1979 and who has completed at least twenty years of Accrual Service and is eligible for an Incentive Retirement Benefit as provided in 3.05 but has not reached his 62nd birthday and neither has become eligible nor would have upon proper application become eligible for a benefit under the Social Security Act based on his employment, shall be eligible, as determined under the provisions of 10.01, for an Early Retirement Supplemental Benefit in addition to any benefit for which he may be eligible in accordance with 3.03, 3.04 or 3.05.

(b) The monthly amount of the Early Retirement Supplemental Benefit payable to an Employee

eligible therefor in accordance with (a) of this 3.06 shall be the product of $12.00 multiplied by his years of Accrual Service to a maximum of 35 years.

3.07 Surviving Spouse Automatic Benefit.

(a) If an Employee dies on or after June 1, 1979 while employed by an Employer leaving a surviving spouse, such spouse shall be eligible, as determined under the provisions of 10.01, for a Surviving Spouse Automatic Benefit provided at the time of death, the Employee:

(1) has attained his 55th birthday and accrued at least ten years of Accrual Service, or

(2) has accrued at least 20 years of Accrual Service, or

(3) has attained his 65th birthday.

If an Employee, who terminates employment with the Employer after he has either attained his 55th birthday and accrued at least ten years of Accrual Service or attained his 65th birthday, dies after the date of such termination and on

or after June 1, 1979 but before payment of his benefit has begun; the surviving spouse, if any, of such an Employee shall be eligible, as determined under the provisions of 10.01, for a Surviving Spouse Automatic Benefit.

(b) The Surviving Spouse Automatic Benefit payable to the surviving spouse of a deceased Employee eligible for such benefit in accordance with (a) of this 3.07 shall be a monthly benefit payable for the life of such spouse computed and payable in the same manner as the reduced monthly benefit which would have been payable assuming the Employee had elected to have his Normal or Early Retirement Benefits begin immediately on a reduced basis under (b) of 4.01 and also assuming that the Employee had:

(1) become eligible for such reduced monthly benefit immediately prior to death, in case of an Employee who had attained his 55th birthday prior to death, or

(2) survived and become eligible for such reduced monthly benefit on the date on which he would have become age 55 and died immediately thereafter, in the case of an Employee who dies prior to age 55 (but in determining the reduced monthly benefit which would have been payable under this (2) Accrual Service at death prior to age 55 shall be used and the 100% decrease in the reduction described in (b)(5) and (c)(4) of 4.01 shall be disregarded).

3.08 Designated Co-Pensioner Benefit.

(a) If an Employee dies on or after June 1, 1977 leaving no surviving spouse but leaving a person designated as a co-pensioner in a written application filed with the Joint Committee, said designated co-pensioner shall be eligible, as determined under the provisions of 10.01, for a Designated Co-Pensioner Benefit provided at the time of death the Employee is employed by an Employer and:

(1) has attained his 55th birthday and accrued at least ten years of Accrual Service or,

(2) has accrued at least 20 years of Accrual Service.

(b) The Designated Co-Pensioner Benefit payable to the designated co-pensioner of a deceased Employee eligible for such benefit in accordance with subsection (a) of this 3.08 shall be a monthly benefit payable for the life of such co-pensioner computed and payable in the same manner as the reduced monthly benefit which would have been payable assuming the Employee had elected to have his Normal or Early Retirement Benefit begin immediately on a reduced basis under (c) of 4.01 and also assuming that the Employee had:

(1) become eligible for such reduced monthly benefit immediately prior to death, in case of an Employee who had attained his 55th birthday prior to death, or

(2) survived and become eligible for such reduced monthly benefit on the date on which he would

have become age 55 and died immediately thereafter, in the case of an Employee who dies prior to age 55 (but in determining the reduced monthly benefit which would have been payable under this (2) Accrual Service at death prior to age 55 shall be used and the 100% decrease in the reduction described in (b)(5) and (c)(4) of 4.01 shall be disregarded).

3.09 Pensioner Benefits.

(a) With respect to Pensioners, benefits shall be payable on and after June 1, 1979 in accordance with the Plan in effect on May 31, 1979 except as provided in (b) and (c) of this 3.09.

(b) In the case of a Pensioner to whom or to whose beneficiary the Plan paid a benefit in May of 1979 and who met the age and service eligibility requirements for a normal or early retirement benefit or a total and permanent disability benefit under the Plan provisions in effect at his termination of employment (but not including any Pensioner whose employment was terminated prior to the earliest age to

at which such Pensioner could become entitled to immediate payment of retirement benefits for reasons other than total and permanent disability under the provisions of the Plan in effect at such termination, or any Employee), monthly, normal or early retirement benefit payments or total and permanent disability benefit payments (including any monthly benefits for which a Pensioner becomes eligible after any determination that the Pensioner is no longer totally and permanently disabled or after he attains his 65th birthday) payable on or after June 1, 1979 to such Pensioner or his beneficiary will be equal to the monthly, normal or early retirement benefit or total and permanent disability benefit payable under the Plan in effect on May 31, 1979 to such Pensioner or beneficiary, increased by 10%.

(c) Incentive retirement benefits and early retirement supplemental benefits for which a Pensioner is eligible under the Plan in effect on May 31, 1979 shall be payable under the applicable provisions of the Plan in effect

on May 31, 1979 and will not be increased by (b) of this 3.09.

ARTICLE IV PAYMENT OF BENEFITS

4.01 Normal, Disability, Vested and Early Retirement Benefits.

(a) Life Only. Benefits for an Employee eligible for a Normal, Disability, Early or vested-Retirement Benefit shall be payable to such eligible Employee commencing as of the first day of the calendar month immediately following the date such Employee becomes eligible for such benefits under the Plan, provided the Employee be living on such first day, and shall be payable on the first day of each calendar month thereafter during the lifetime of such Employee, except as may be otherwise provided in this 4.01.

(b) Joint and 50% to the Surviving Spouse Benefit.

(1) If a Participant has a spouse on the date he becomes eligible for a Normal, Disability, Early or Vested Retirement Benefit and he has not filed a written election with the Employer before the end of the 30 day period beginning with such date to have benefit payments made only for the Employee's life in accordance with the life only form provided in (a) of this 4.01 or under the Copensioner Option provided in (c) of this 4.01, such benefit shall be reduced to a Joint and 50% to the Surviving Spouse Benefit for the Employee and such spouse.

(2) The Employee's reduced benefit shall be payable monthly while such Employee and spouse are living, commencing as of the first day of the calendar month immediately following the date he becomes eligible for a benefit under Article III, and after the Employee's death 50% of such reduced benefit shall be payable to such spouse, if then living, as a monthly benefit for as long as said spouse shall live.

(3) If the dates of birth of the Employee and his spouse occur in the same calendar year, the reduced benefit payable to the Employee shall be:

(A) 90% of the benefit otherwise payable, for any Employee eligible for a Normal, Early or Vested Retirement Benefit or a Disability Retirement Benefit commencing on or after the Employee's 55th birthday, and the 90% factor will be increased (or decreased) by 1/2 of 1% for each year (rounded to the nearest full year) in excess of five full years that the date of birth of the spouse precedes (or follows) the Employee's date of birth, or

(B) for any Employee eligible for a Disability Retirement Benefit commencing -

(i) before his 55th birthday and on or after his 50th birthday, 85% of the benefit otherwise payable,

(ii) before his 50th birthday and on or after his 45th birthday, 80% of the benefit otherwise payable, or

(iii) before his 45th birthday, 75% of the benefit otherwise payable;

and the 85%, 80% and 75% factors will be increased (or decreased) by 1/2 of 1% for each year (rounded to the nearest full year) that the date of birth of the spouse precedes (or follows) the Employee's date of birth.

(4) In no event shall any increase provided in (3) of this (b) result in a benefit payable to the Employee which exceeds 95% of the benefit otherwise payable. Satisfactory proof of age of such spouse will be required prior to payment under this (b).

(5) Any benefit payable under this (b) for a month after the date the Employee is (or would have been had he survived) age sixty-five to the surviving spouse of an Employee who terminates employment after such

Employee attains the age of fifty-five, shall be based on the Employee's benefit determined under (b)(2) of 3.04.

(6) If a reduced benefit becomes payable to an Employee under this (b), the amount of any benefit payable to such Employee following death of his spouse shall be determined under Article III based on Accrual Service at termination of employment and payable in accordance with (a) of this 4.01.

(c) Co-Pensioner Option.

(1) An Employee who is eligible for a Normal, Disability, Early or Vested Retirement Benefit may elect a Co-pensioner Option by so notifying the Joint Committee in writing designating any person as a co-pensioner. In this event, the Employee will receive a reduced benefit payable monthly while such Employee and co-pensioner are living, commencing as of the first day of the calendar month immediately following the date he becomes eligible for a benefit under Article III, and after the

Employee's death 50% of such reduced benefit shall be payable to such co-pensioner, if then living, as a monthly benefit for as long as said co-pensioner shall live.

(2) If the dates of birth of the Employee and the co-pensioner occur within a period of six months, the reduced benefit payable to the Employee shall be:

(A) 83% of the benefit otherwise payable, for any Employee eligible for a Normal, Early or Vested Retirement Benefit or a Disability Retirement Benefit commencing at or after the Employee's 55th birthday, and

(B) for any Employee eligible for a Disability Retirement commencing -

(i) before his 55th birthday and on or after his 50th birthday, 78% of the benefit otherwise payable,

(ii) before his 50th birthday and on or after his 45th birthday, 73% of the benefit otherwise payable, or

(iii) before his 45th birthday, 68% of the benefit otherwise payable;

except that the 83%, 78% 73% and 68% factors shall be increased (or decreased) by 1/2 of 1% for each year (rounded to the nearest full year) that the date of birth of the co-pensioner precedes (or follows) the Employee's date of birth.

(3) In no event shall any increase provided in (2) of this (c) result in a benefit payable to the Employee which exceeds 95% of the benefit otherwise payable. Satisfactory proof of age of the co-pensioner will be required prior to payment under this (c).

(4) Any benefit payable under this (c) for a month after the date the Employee is (or would have been had he survived) age sixty-five to the co-pensioner

of an Employee who terminates employment after such Employee attains the age of fifty-five, shall be based on the Employee's benefit determined under (b)(2) of 3.04.

(5) If a reduced benefit becomes payable to an Employee under this (c), the amount of any benefit payable to such Employee following death of his co-pensioner shall be determined under Article III based on his Accrual Service at termination of employment and payable in accordance with (a) of this 4.01.

(d) Notice and Explanation of Optional Benefits.

At least nine months before the Employee's 55th birthday, the Joint Committee shall provide each Employee with a written notice of the availability of:

(1) an election to receive benefits under the Plan in a form other than a Joint and 50% to the Surviving Spouse Benefit described in (b) of this 4.01, and

(2) a written explanation in non-technical language of the terms and conditions of such Joint and 50% to the Surviving Spouse Benefit and of the financial effect upon the Employee's benefit (in terms of dollars per annuity payment) of making an election under (b) of this 4.01.

Within 30 days after an Employee's written request to the Joint Committee for information on the options available, the Joint Committee shall furnish the Employee with such written explanation of the Joint and 50% to the Surviving Spouse Benefit and of the effect of an election to have benefits payable only for the Employee's lifetime under (a) of this 4.01. The Employee may cancel or reinstate any such election by filing written notice with the Joint Committee at any time prior to the end of a period of 30 days immediately following the date he becomes eligible for a retirement benefit under the Plan, but not there after.

(e) Termination of Disability Retirement Benefit. A Disability Retirement Benefit payable to an Employee under (a), (b) or (c) of this 4.01 shall be terminated on the date of the earliest to happen of the following:

(1) engaging by the Employee in any regular gainful occupation or employment for remuneration or profit (except for purposes of rehabilitation as may have been previously approved by the Joint Committee),

(2) refusal by the Employee to undergo a medical examination ordered by the Joint Committee, provided that the Employee shall not be required to undergo a medical examination more often than twice a year after Total and Permanent Disability has existed for more than one year, or

(3) determination by the Joint Committee that the Employee is no longer Totally and Permanently Disabled.

4.02 Incentive Retirement Benefit. The Incentive Retirement Benefit shall be payable to an Employee eligible therefor under 3.05, commencing as of the first day of the calendar month immediately following the date such Employee becomes eligible for such benefit, provided the Employee is living on such first day, and shall be payable on the first day of each month thereafter during the lifetime of such Employee; provided, however, that no Incentive Retirement Benefit shall be payable after the Employee's 65th birthday.

4.03 Early Retirement Supplemental Benefit. The Early Retirement Supplemental Benefit shall be payable to an Employee eligible therefor under 3.06 commencing as of the first day of the calendar month immediately following the date such Employee becomes eligible for such benefit, pro-

vided the Employee is living on such first day, and shall be payable on the first day of each month thereafter during the lifetime of such Employee; provided, however, that no Early Retirement Supplemental Benefit shall be payable after the earlier of the Employee's 62nd birthday and the date the Employee becomes eligible or would upon proper application become eligible for a benefit under the Social Security Act based on his employment.

4.04 Offset Against Retirement Benefits Under Another Plan. The rights of Employees under this Plan have been established in lieu of any rights which any such Employees or their beneficiaries may have or may have had under any other pension or retirement plan of any Employer adopted prior to and in effect as of the effective date of this Plan, except as specifically otherwise provided by such other plan as amended to the date of execution of this Plan. To the extent that said specific provisions of such other plan require reduction of benefits payable under it on account of benefits

payable with respect to Employees under this Plan, benefits paid to Employees under this Plan shall operate to reduce (and shall be paid under this Plan only to the extent that they have the effect of reducing) said retirement benefits under such other plan in accordance with said specific provisions of such other plan.

ARTICLE V TOTAL AND PERMANENT DISABILITY DETERMINATION

Total and Permanent Disability under the Plan means a physical or mental condition which totally disables and which is expected to and presumably will continuously and permanently and totally disable the Employee so that he is permanently prevented from engaging in any regular employment with any employer or any other gainful occupation for which he is or may be suited by education, training, or experience, except such employment as is found by the Joint Committee to be for the purpose of rehabilitation or to be compatible with the finding of Total and Permanent Disability.

Such Employee shall be required to furnish such proof of Total and Permanent Disability as the Joint Committee

may determine; provided, however, that the Joint Committee may require a medical examination by a physician or clinic chosen by the Joint Committee at the expense of the Plan.

Notwithstanding the above, no Disability Retirement Benefits shall be payable due to a disability which:

(a) results from the Employee's addiction to narcotics or drugs,

(b) was contracted, suffered, or incurred while the Employee was engaged in or resulted from his having engaged in the commission of a felony of which he was convicted,

(c) resulted from an intentionally self-inflicted injury, or

(d) resulted from service in the armed forces of the United States or Canada for which a service connected government disability pension is payable, or from service in the armed forces of any other country.

Notwithstanding an initial finding of Total and Permanent Disability, the Joint Committee may require an Employee who is prior to age 65 to furnish proof of continuance of such disability at any reasonable time or to submit to medical examination by the Joint Committee, but

not in excess of twice per year after Total and Permanent Disability has existed for more than one year.

ARTICLE VI CONTRIBUTIONS BY EMPLOYERS

Each Employer shall contribute to the Fund such amounts as it may from time to time be obligated to contribute in accordance with a then current collective bargaining agreement between the Union and such Employer, but in no event less than the minimum contribution required under the Act. The foregoing agreement to contribute is an individual, several liability, and not a joint liability, of the respective Employers.

The contribution to be made by each Employer hereunder covering all payroll periods for which wages have been paid by such Employer within a given calendar month shall be made by the Employer no later than ten business days, next following the last day in such month upon which the Employer has paid wages to its Employees.

On the basis of actuarial cost studies, the Employers and the Union believe, but do not undertake or agree, that the Fund created by Employer contributions will provide the benefits set forth in this Plan on a sound actuarial basis, and will meet the full current cost of the Plan and will amortize the original past service cost of the Plan and each later

increment of past service cost due to plan changes, on a level funding basis over a period of not in excess of thirty years from the date each item of past service cost was incurred.

ARTICLE VII DISCONTINUANCE OF THE PLAN BY AN EMPLOYER

If an Employer ceases to be an Employer as defined herein, its then Employees shall be treated as having had their services with such Employer terminated for the purpose of determining the period during which they retain the right to reinstatement of Vesting Service and Accrual Service under 2.06; provided, however, that:

(a) within 60 days after such cessation the Joint Committee will notify the Pension Benefit Guaranty Corporation thereof and request determination by such Corporation of the Employer's liability under the Act, unless, such cessation does not constitute a withdrawal from the Plan under Section 4063 of the Act and the funding provisions of Article VI continue to be met; and

(b) at any time within three years after such date the Joint Committee may, if it deems it necessary to protect the interests of the Employees and Pensioners and their spouses and, in the event a failure to meet the funding requirements of Article VI has occurred, after notifying the Pension Benefit

Guaranty Corporation and complying with all other applicable provisions of Section 4041 of the Act, elect to determine and make provision for payment of the interests of the Employees of the discontinued Employer as if there has been a complete termination of the Plan as to all Employees in accordance with Article VIII as of the date the Employer ceased to be an Employer (such action on the part of the Joint Committee shall not in itself terminate the Plan with respect to the Employees of the then remaining Employers).

ARTICLE VIII TERMINATION OF THE PLAN

8.01 Termination by Joint Committee. The Plan shall be terminated by the Joint Committee if and when all Employers cease to be Employers as defined herein.

8.02 Notice to Pension Benefit Guaranty Corporation. In the event of such termination, the Joint Committee shall notify the Pension Benefit Guaranty Corporation as provided by the Act.

8.03 Allocation of Fund.

(a) Upon receipt of notice from such Corporation authorizing termination of the Plan, the assets then remaining in the Fund after providing for the expenses of the Plan and the Fund shall be allocated to the extent they shall be sufficient for the purpose of paying the benefits of the Plan

in accordance with Section 4044 of the Act, which provides substantially the following order of precedence:

(1) First, in the case of benefits which were in pay status as of the beginning of the 3-year period ending on said termination date (based on the lowest benefit level in pay status during the 3-year period) or which would have been on pay status at the beginning of said 3-year period if the Employee had retired from the service of the Employer prior thereto and elected to have his retirement benefit begin at the earliest possible date.

(2) Second, in the case of all other benefits of the Plan which are guaranteed under Title IV of the Act or which would be so guaranteed if Sections 4022(b)(5) and (6) of the Act did not apply.

(3) Third, in the case of all other benefits which are vested or would be vested if termination of service had occurred at said termination date.

(b) Benefits described in (a)(1) and (3) of this 8.03 shall be based on Plan provisions (as in effect during the 5-year period ending on said termination date) under which such benefits would be the least, if the assets available for allocation are inadequate to provide the benefits described in (a) of this 8.03 in full.

(c) If the assets are more than adequate to provide the benefits as described in (b) of this 8.03, then the benefits described in (a)(1) and (3) of this 8.03 shall be based on the most recent Plan amendment which assures that the benefits described in (a) of this 8.03 can be provided in full by the available assets, and any assets remaining after such application shall be allocated to provide any increase in benefits effected by the next succeeding Plan amendment, following the priorities established in (a) of this 8.03.

(d) Any assets available for allocation in excess of those necessary to provide in full the benefits described in (a) of this 8.03 based on the Plan provisions in effect at said termination date shall be applied to provide a monthly retirement benefit beginning at age 65 to each Employee not covered under (a) of this 8.03, based on Accrual Service.

(e) Any assets remaining after the allocation under (d) of this 8.03 shall be refunded to the Employer.

(f) If the allocable assets available to provide benefits described in (a) (1), (2) or (3) or (d) of this 8.03 are insufficient to provide for such benefits in full, the amounts of said benefits shall be reduced on a pro-rata basis to the extent necessary.

(g) The allocations provided for above shall be applied to provide said benefits in such manner as shall be agreed upon by the Employer and the Pension Benefit Guaranty Corporation or by payment of the segregated fund to a court-appointed trustee under the Act.

ARTICLE IX AMENDMENT OF THE PLAN

The Plan may be modified, altered, or amended upon mutual agreement of the Union and the Employers; provided, however, that, whether upon termination of the Plan or otherwise, no part of the corpus or income of the Fund can be used for, or diverted to, purposes other than for the exclusive use of the Employees and Pensioners and their spouses and co-pensioners, and no such amendment shall be effective which is inconsistent with the provisions of the Act.

ARTICLE X ADMINISTRATION PROVISIONS

10.01 Determination of Benefits. No Employee, spouse or co-pensioner shall be eligible for a benefit hereunder until his right thereto and the form thereof shall have been finally determined by the Joint Committee consistent with the Plan nor until he shall have submitted to the Joint Committee, in such form as the Joint Committee may require, all information requested, and then benefits shall be payable only to the extent that there are amounts available in

the Fund to pay such benefits. If the Joint Committee determines that the Employee, spouse or co-pensioner is not eligible for such benefits, a written denial setting forth the specific reasons for failure to meet the conditions of eligibility and specifying the procedure by which the claimant can obtain a review of the claim, shall be provided by the Joint Committee to the Employee, spouse or co-pensioner.

10.02 Payments to Incompetents. If the Joint Committee shall find that an Employee, spouse or co-pensioner to whom a benefit is payable is physically, mentally, or legally unable to receive or acknowledge receipt thereof, any payment due, in the absence of claim filed by a duly appointed guardian, committee or other legal representative, may be paid to the spouse, a child, a parent, a brother, a sister, or other relative of the Employee, spouse of co-pensioner or another person for the benefit of the Employee, spouse or co-pensioner, as the Joint Committee determines. Any such payment shall be a complete discharge of any liability of the Plan and the Fund therefor.

10.03 Record of Retired Employees. It shall be the duty of each Employee entitled to benefits hereunder to keep the Joint Committee informed with regard to his residence address. If the Joint Committee has no record of the

Employee's residence for a continuous period of one year, it may be conclusively presumed that the Employee is deceased; provided, however, that if he shall later notify the Joint Committee regarding his address while the Plan is still in effect, benefits for which he is eligible under the Plan shall be provided to him.

10.04 Non-Alienation of Benefits. No benefit payable at any time under the Plan shall be subject in any manner to alienation, sale, transfer, assignment, pledge, attachment or encumbrance of any kind. Any attempt to alienate, sell, transfer, assign, pledge or otherwise encumber any such benefit, whether presently or hereafter payable, shall be void. If any person entitled to a benefit under the Plan shall attempt to or shall alienate, sell, transfer, assign, pledge, or otherwise encumber his benefit or any part thereof, or if, by reason of his bankruptcy or other event happening at any time, such benefit or part thereof would devolve upon anyone else or would not be enjoyed by him, then the Joint Committee in its discretion may terminate his interest in any such benefit and apply it to or for the benefit of such person, his spouse, children, or other dependents, or any of them, in such manner as the Joint Committee may deem proper. Provided, however, that in the event the Union, the Employers or any

combination of them arranges group hospital or surgical care benefits or insurance for Employees receiving benefits hereunder any Employee then currently receiving benefits hereunder may, by his revocable written authorization acceptable to the Joint Committee, have deducted from his benefit payments hereunder the amount of the subscription rates or premiums for such group hospital or surgical care benefits or insurance coverage which do not exceed 10% of any such benefit payment.

ARTICLE XI FUND

Contributions made by the Employers in accordance with Article VI hereof shall be deposited in a Fund which shall be held by a Trustee. No Employee shall be required to make any contribution to the Fund. Such Fund shall be used to pay the benefits, the fees of the Trustee, and other expenses specifically chargeable to the Fund by the terms of the Plan. The benefits shall be limited to such amounts as can be provided by the Fund; such benefits and any fees and expenses shall be payable only from the Fund and only at the direction of the Joint Committee. Except as provided in the Act, neither the members of the Joint Committee, the Union, the members of the Union, the Trustee, the Employers nor any of them shall:

(a) be liable for the payment of such benefits, fees or expenses,

(b) in any way guarantee the Fund or the Employees or Pensioners or spouses or co-pensioners of either, against loss of or depreciation in any of the assets of the Fund or guarantee the payment of any benefits under the Plan, or

(c) have any liability for a Plan responsibility allocated to another hereunder.

The Joint Committee shall select and contract with the Trustee and shall have the full right to remove such Trustee and to select its successor or successors and to determine the form and terms, consistent with the terms of this Plan, of any trust agreement with the Trustee. Any trust agreement with the Trustee shall designate the fiduciary or fiduciaries with powers, duties, rights and discretions in investing, retaining, selling and managing the assets constituting the Fund as required by the Act.

Any Trustee designated hereunder shall be a bank or trust company incorporated under the laws of the United States or any State and qualified to act thereunder as a Trustee.

ARTICLE XII ADMINISTRATION OF THE PLAN

12.01 Joint Committee - Composition. The Plan shall be administered by the Joint Committee, four members of which (hereinafter referred to as the Union members) shall be appointed by the Union, and four members of which (hereinafter referred to as the Employer members) shall be appointed by certain of the Employers as hereinafter set forth.

12.02 Employer Members - Appointment. Each Employer shall, in writing, appoint one person of its choice to serve as an Employer member of the Joint Committee. Each Employer shall give prompt written notice by registered mail to each other Employer and the Union of the name and address of the member of the Joint Committee whom it has appointed. The fourth Employer member of the Joint Committee shall be appointed by the written concurrence of all Employers and such members shall act as Secretary to the Joint Committee.

No persons shall serve or be appointed to serve as a member of the Joint Committee in contradiction of the terms of Section 411 of the Employee Retirement Income Security Act of 1974, as amended. No person shall be disqualified from being a member of the Joint Committee hereunder by reason of the fact that he is or hereafter becomes an Employee or Pensioner.

12.03 Employer Members - Removal. Each Employer member of the Joint Committee may be removed as such member by the Employer or Employers which shall have appointed him. In case of such removal or in the event of the death of any such Employer member, the appointing Employer or Employers shall, within five days following such removal or death, have the right to appoint a new Employer member, subject to the same notice requirements, waiver privileges and rights as are set forth in 12.02 in respect to the appointment of initial Employer members of said Committee.

12.04 Union Members - Appointment and Removal. The Union shall give prompt written notice by registered mail addressed to each Employer of the name and address of each Union member of the Joint Committee which it may appoint. The Union may at any time remove any Union member of said Committee and may appoint a new member to fill any vacancy resulting from such removal or caused by the death of any such member. The Union shall give prompt written notice by registered mail to each Employer of the name and address of each new Union member of the said Committee which it may appoint.

12.05 Effective Date of Member Appointments. No appointment of Union members or Employer members shall

be effective unless and until notices of such appointment shall be mailed as provided, respectively, in 12.02, 12.03 and 12.04.

12.06 Joint Committee Members - Compensation. Employer and Union members of the Joint Committee shall serve without compensation from the Fund.

12.07 Joint Committee - Quorum and Voting. To constitute a quorum for the transaction of business, there shall be required to be present at any meeting of the Joint Committee at least three Union members and at least three Employer members. The Employer members so present shall be entitled to cast a total of four votes and the Union members so present shall be entitled to cast a total of four votes. Decisions of the Joint Committee shall be by a majority of the votes cast; provided, however, that any such meeting of the Joint Committee and with respect to any and all actions, decisions or agreements of the Joint Committee all four votes of the Employer members shall be cast en bloc as determined by a majority of the Employer members present.

12.08 Joint Committee - Responsibilities and Powers.

(a) The Joint Committee shall have full and

complete authority and control over the Plan and in connection with their operation and administration of the Plan, unless the following responsibilities are allocated or delegated in accordance with the procedures set forth in (b)(11) and (b)(12) of this 12.08, the Joint Committee shall:

(1) Establish and maintain a funding policy and method consistent with the Plan's objectives and in accordance with any law applicable to the Plan.

(2) Prepare, execute, file and retain a copy for the Plan records of all reports required by law or deemed by them to be necessary or appropriate for the proper administration and operation of the Plan.

(3) Procure an audit of the books of the Plan by a certified public accountant not less frequently than once each year.

(4) Procure and maintain at the expense of the Plan such bonds as required by law, together with such additional bonding coverages they may determine for the members of the Joint Committee, employees of the Plans, any agents acting on behalf of or retained by the Joint Committee and persons to whom fiduciary responsibilities have been delegated.

(b) The Joint Committee shall have such powers as are necessary for the proper administration of the Plan, including the following:

(1) To prescribe procedures to be followed by Employees, Pensioners, spouses and co-pensioners in filing applications for benefits, and for the furnishing of evidence (including without limitation proofs of birth, death, marriage, disability and employment) necessary to establish rights to such benefits.

(2) To make determinations of the rights of any Employee, Pensioner, spouse or co-pensioner applying for or receiving benefits, and to afford any such individual dissatisfied with any such determination the right to a hearing thereon before the Joint Committee.

(3) To develop procedures for the establishment of service of Employees and, after affording Employees an opportunity to make objection with respect thereto, to establish such service conclusively in advance of retirement.

(4) To obtain from the Employers, from the Union, from the Employees, Pensioners, spouses and co-pensioners, or from such other parties as are involved in the Plan, such information as shall be necessary (A) for

proper administration of the Plan, (B) for securing and maintaining approval under Section 401(a) of the Internal Revenue Code of 1954, as amended, and (C) for making filings from time to time with the Labor Department, the Internal Revenue Service and the Pension Benefit Guaranty Corporation as required by the Act.

(5) To authorize all disbursements from the Fund in accordance with this Agreement, and to establish necessary procedures therefor.

(6) To prepare and distribute in such manner as the Joint Committee determines to be necessary or appropriate any information explaining the Plan.

(7) To furnish to any Employer and to the Union, upon request, such reports with respect to the administration of the Plan as are reasonable and appropriate.

(8) To make such arrangements as may be necessary for proper administration of the Plan, which may involve arrangement of office space, equipment, or services.

(9) To retain at the expense of the Fund such legal, actuarial, or accounting counsel as it may deem necessary or advisable.

(10) To determine from time to-time who shall be eligible for benefits under the Plan; the nature, type, character and amount of benefits to be provided and the medium by which such benefits shall be provided. In determining who shall be eligible for benefits under the Plan, the Joint Committee may establish standards for granting or denying such eligibility to Employees.

(11) To designate in writing persons who are not members of the Joint Committee to carry out fiduciary or nonfiduciary responsibilities or duties of the Joint Committee, and in the event of such a designation, the members of the Joint Committee shall not be liable for any act or omission of such a person.

(12) To allocate, in writing, fiduciary or nonfiduciary responsibilities or duties among the members of the Joint Committee provided the member to whom such responsibility has been allocated consents thereto. Those persons to whom such responsibilities have not been allocated shall not be liable for any act or omission of those persons to whom such responsibilities have been allocated.

(13) To construe and interpret this Plan and any agreement with a Trustee.

(14) To the extent such is consistent with the provisions of Section 41O(b) of the Employee Retirement Income Security Act of 1974, to purchase out of the assets of the Plan, insurance for the benefit of the Plan and/or the protection of the members of the Joint Committee, Plan employees or other fiduciaries of the Plan against any losses by reason of errors or omissions or breach of fiduciary duty.

(15) To pay membership dues in educational and other organizations operated for purposes related to the Plan.

(16) To appoint one or more investment managers to supervise and direct the investment and reinvestment of a portion or all of the Fund. Any investment manager appointed shall be an investment advisor registered under the Investment Advisers Act of 1940, a bank as defined in such Act or an insurance company which is qualified to manage the assets of employee benefit plans under the laws of more than one state. As a condition to its appointment, an investment manager shall acknowledge in writing that it is a fiduciary with respect to the Plan. The Joint Committee may furnish an investment manager with written investment guidelines which guidelines may include

directions with respect to diversification of the investments. Any investment manager shall receive such reasonable compensation chargeable against the Fund as shall be agreed upon with the Joint Committee.

12.09 Reliance and Liability. The Joint Committee and any member thereof shall be entitled to rely upon the correctness of any information furnished by the Employers, the Employees and Pensioners and their spouses and co-pensioners, or the Union. Neither the Joint Committee nor its members, nor the Trustee, nor the Union, nor any officer or any other representative of any Employer, shall be liable to any person whatsoever, because of any act or failure to act on the part of the Joint Committee, or any of its members, except that nothing herein shall be deemed to relieve any individual member of the Joint Committee from liability for his own fraud or bad faith or from its liability under the Act.

12.10 Arbitration. In the event the Employer members and the Union members fail to agree upon a matter which is properly before the Joint Committee and within its authority to determine, a deadlock shall be deemed to exist and the Joint Committee may then select a neutral person as an impartial arbitrator who is willing to act in the resolution of such deadlock. In the event the Employer members and

the Union members are unable to agree upon the selection of an impartial arbitrator within 30 days after such deadlock and if the matter over which the deadlock has occurred is subject to the impartial umpire requirements of section 302(c)(5)(B) of the Taft-Hartley Act, then any one or more of the members of the Joint Committee may request the Federal Mediation and Conciliation Service to supply a list of seven names of qualified arbitrators. The Employer members of the Joint Committee and the Union members of the Joint Committee shall take turns striking a name from the list until there is one name remaining, and this individual shall be the impartial arbitrator. Any expenses, costs and attorneys' fees in connection with the foregoing shall be paid by the Plan, including any reasonable compensation to the arbitrator. The impartial arbitrator shall have no power to alter, delete, amend, add to, take away from or disregard any of the provisions of this Agreement or this Plan and shall have no power to cause the Joint Committee to alter, delete, amend, add to, take away from or disregard any provision of this Agreement or this Plan. The decision of the impartial arbitrator shall be final and binding upon the Joint Committee, all parties hereto, Pensioners, the Employees and their beneficiaries. The Joint Committee shall take or omit

taking any action or actions that may be indicated in order to give effect to the decision of the impartial arbitrator.

It is specifically understood and agreed by the parties hereto that neither this Agreement nor this Plan nor any question or dispute relative to the provisions of this Agreement or this Plan shall be subject to the grievance or arbitration procedures established in any collective bargaining agreement between an Employer and the Union.

12.11 Joint Committee - Limitations on Powers. The Joint Committee shall have no power, authority or discretion relative to the investment, reinvestment, exchange, retention, sale or management of the assets constituting the Fund. Nor shall the Joint Committee have power to add to or subtract from or modify any of the terms of this Agreement or this Plan, nor to waive or fail to apply any requirement of eligibility for a benefit under this Agreement or Plan. Any case referred to the Joint Committee on which it has no power to rule shall be referred back to the parties without ruling.

12.12 Joint Committee - No Precedents. No ruling or decision of the Joint Committee in one case shall create a basis for a retroactive adjustment in any other case prior to the date of written filing of each such specific claim.

ARTICLE XIII RETIREMENT AGE

No employee shall be retired for age reasons alone without his consent before his 70th birthday.

An Employee's retirement may be deferred beyond such date only upon approval by the Employee's Employer and approval by the Union of the Employee's written request for such deferment, without regard to seniority.

Any Employee on the seniority list on March 1, 1953 and who shall have been or shall be retired, at or after his 65th birthday and after June 1, 1977, with eight or more but with less than fifteen years of Accrual Service shall instead be credited with an aggregate of fifteen years of Accrual Service and his benefit shall be computed accordingly.

ARTICLE XIV GENERAL

14.01 Internal Revenue Code Qualification and Compliance With Act. The parties hereto intend that this Plan and any trust agreement entered into pursuant hereto shall conform to the provisions of the Act and qualify under Section 401(a) of the Internal Revenue Code, as amended, and that all contributions made under the provisions of this Plan shall be deductible for income tax purposes. It is the understanding of the parties that this Plan is presently in conformity with the requirements of the Act and of Sections

401(a), 404(a) and all other applicable provisions of the Internal Revenue Code. The parties hereto agree that should this Plan at any time be found not to so conform or not to so qualify any contributions hereunder as deductible for income tax purposes, they will meet promptly upon the request of any party hereto and will negotiate as speedily as possible such amendments or modifications of the Plan as may be necessary to conform to the Act and to qualify or maintain the Plan as a plan meeting the requirements of Sections 401(a) and 404(a) of the Internal Revenue Code, as now in effect, or hereafter amended, or any other applicable provisions of the Federal tax laws as now in effect or hereafter amended or adopted and any regulations issued thereunder. Such amendments or modifications may be made retroactive, if necessary or appropriate, to accomplish the above-described purposes.

14.02 Gender. Words of the masculine shall include the feminine gender where applicable.

14.03 Titles to Sections. The sections of this Agreement have been identified by title for the purpose of ready reference only and such titles shall not be deemed to affect the meaning or construction of any of the provisions hereof.

14.04 Merger, Consolidation or Transfer of Assets and Liabilities to Other Plans. To the extent law applicable to the Plan requires at the time of merger, consolidation or transfer, there shall be no merger or consolidation of the Plan nor a transfer of the Plan's assets or liabilities to another plan unless each Employee were entitled to receive a pension benefit immediately after such event (if such other plan then terminated) which is equal to or greater than the pension benefit he would have been entitled to receive if this Plan had terminated immediately prior to such event.

14.05 Service in More Than One Fiduciary Capacity. Any individual, entity or group of persons may serve in more than one fiduciary capacity with respect to the Plan, the Fund or both to the extent such is permitted by law.

14.06 Payments To and From the Plan. Payments from the Plan shall be made without limitation by reason of enumeration for the following purposes:

(a) To provide for:

(1) the payment of all reasonable and necessary expenses of establishing the Plan, collecting the contributions and operating, administering, controlling or

managing the Plan; including payment of membership dues in educational and other organizations operated for purposes related to this Plan;

(2) the employment of such administrative, legal, expert and clerical assistance as may be reasonably necessary;

(3) the purchase or leasing of such premises as may be necessary for the operation of the affairs of the Plan; and

(4) the purchase or leasing of such materials, supplies and equipment as the members of the Joint Committee, in their discretion, find necessary or appropriate to the performance of their duties.

(b) To pay or provide for pension benefits to Employees and their spouses and designated co-pensioners in accordance with the terms, provisions and conditions of the Plan.

14.07 Savings Clause. In case any provision of this Plan shall be illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining parts of this Plan, but this Plan shall be construed and enforced as if it had never contained such illegal or invalid provisions.

JOS. SCHLITZ BREWING CO.
MILWAUKEE, WISCONSIN 53201

August 14, 1981

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Ms. Ethel M Gormley
Secretary-Joint Committee
Milwaukee Brewery Workers
Pension Plan
2189 North 48th Street
Milwaukee, Wisconsin 53208

Schlitz Exhibit 45
Plan Exhibit 79

Mr. Robert Gustafson
Pabst Brewing Company
917 West Juneau Avenue
Milwaukee, Wisconsin 53201

Mr. John Van Vleet
Miller Brewing Company
3939 West Highland Boulevard
Milwaukee, Wisconsin 53208

Mr. Kenneth Mueller
Brewery Workers Union
2089 North 48th Street
Milwaukee, Wisconsin 53208

Subject: Brewery Workers Pension Plan

Gentlemen and Madam:

This is to advise you that the undersigned hereby resigns as a member of the Joint Committee of the above-referenced pension plan as of this date.

Sincerely,

s/s Charles J. Mazza
Director of Compensation and Benefits

CJM:lab
CC: H.L. Tessler
O.E. Firstenberger

Joint Pension Committee
Milwaukee Brewery Workers Pension Plan

2189 North 48th Street
Milwaukee, Wisconsin 53208

September 29, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
and
HAND DELIVERED

Mr. H. L. Fessler
Vice President, Labor Relations
Jos. Schlitz Brewing Company
235 West Galena Street
Milwaukee, Wisconsin 53201

SCHLITZ EXHIBIT 77
Plan Exhibit 133

Dear Mr. Fessler:

In accordance with the provisions of Section 4219(b) (1) of the Employee Retirement Income Security Act of 1974, as amended, the Joint Committee of the Milwaukee Brewery Workers' Pension Plan has determined that the amount of liability of Jos. Schlitz Brewing Company as a result of its complete withdrawal from the Milwaukee Brewery Workers' Pension Plan is $41,031,406. We have attached to this letter a schedule of payments for the withdrawal liability, which payments include both the amortization of the principal amount, plus interest. This schedule is incorporated in and made a part of this letter as fully as if written out herein.

Demand is hereby made upon you pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended, for payment of the stated employer withdrawal

liability, $41,031,406, plus interest, in quarterly installments in accordance with the attached payment schedule commencing on or before November 1, 1981.

Very truly yours,

MILWAUKEE BREWERY WORKERS' PENSION PLAN

BY s/s Kenneth Mueller
Chairman

cc: Mr. Kenneth Mueller
Mr. J. R. Andres
Mr. T. A. Fulrath

AND s/s_____

Joint Pension Committee
Milwaukee Brewery Workers Pension Plan

2189 North 48th Street
Milwaukee, Wisconsin 53208

September 29, 1981

RE: Jos. Schlitz Brewing Company - Employer Withdrawal Liability Determination of Liability and Payment Schedule

In accordance with the provisions of Section 4219(b)(1) of the Employee Retirement Income Security Act of 1974, the Joint Committee of the Milwaukee Brewery Workers' Pension Plan has determined that the amount of liability of Jos. Schlitz Brewing Company as a result of its complete withdrawal from the Milwaukee Brewery Workers' Pension Plan is $41,031,406; and that the payment schedule for the payment of the amount of liability, plus interest, is as follows:

Payment Date	Amount of Payment
November 1, 1981	$986,370
February 1, 1982	986,370
May 1, 1982	986,370
August 1, 1982	986,370

November 1, 1982	986,370
February 1, 1983	986,370
May 1, 1983	986,370
August 1, 1983	986,370
November 1, 1983	986,370
February 1, 1984	986,370
May 1, 1984	986,370
August 1, 1984	986,370
November 1, 1984	986,370
February 1, 1985	986,370
May 1, 1985	986,370
August 1, 1985	986,370
November 1, 1985	986,370
February 1, 1984	986,370
May 1, 1984	986,370
February 1, 1986	986,370
May 1, 1986	986,370
August 1, 1986	986,370
November 1, 1986	986,370
February 1, 1987	986,370
May 1, 1987	986,370
August 1, 1987	986,370
November 1, 1987	986,370

February 1, 1988	986,370
May 1, 1988	986,370
August 1, 1988	986,370
November 1, 1988	986,370
February 1, 1989	986,370
May 1, 1989	986,370
August 1, 1989	986,370
November 1, 1989	986,370
February 1, 1990	986,370
May 1, 1990	986,370
August 1, 1990	986,370
November 1, 1990	986,370
February 1, 1991	986,370
May 1, 1991	986,370
August 1, 1991	986,370
November 1, 1991	986,370
February 1, 1992	986,370
May 1, 1992	986,370
August 1, 1992	986,370
November 1, 1992	986,370
February 1, 1993	986,370
May 1, 1993	986,370
August 1, 1993	986,370

November 1, 1993	986,370
February 1, 1994	986,370
May 1, 1994	986,370
August 1, 1994	986,370
November 1, 1994	986,370
February 1, 1995	986,370
May 1, 1995	986,370
August 1, 1995	986,370
November 1, 1995	986,370
February 1, 1996	986,370
May 1, 1996	986,370
August 1, 1996	986,370
November 1, 1996	986,370
February 1, 1997	986,370
May 1, 1997	986,370
August 1, 1997	986,370
November 1, 1997	986,370
February 1, 1998	986,370
May 1, 1998	986,370
August 1, 1998	986,370
November 1, 1998	986,370
February 1, 1999	986,370
May 1, 1999	986,370

August 1, 1999	986,370
November 1, 1999	986,370
February 1, 2000	986,370
May 1, 2000	986,370
August 1, 2000	986,370
November 1, 2000	986,370
February 1, 2001	986,370
May 1, 2001	986,370
August 1, 2001	223,976

Very truly yours,

MILWAUKEE BREWERY WORKERS' PENSION PLAN

BY s/s Kenneth Mueller
Chairman

AND s/s Ethel M. G
Secretary

THE FOLLOWING EXHIBIT HAS BEEN INSERTED HORIZONTALLY TO COMPLY WITH SUPREME COURT RULE 33

Exhibit
Plan 146(c)

ACTUARIAL REPORT AS OF JANUARY 1, 1981

MILWAUKEE BREWERY WORKERS' PENSION PLAN

6/17/81

22840-3 APPHA D

FOREWORD

Meidinger, Inc. was retained on behalf of plan participants by the Joint Committee to prepare an actuarial valuation of the Milwaukee Brewery Worker's Pension Plan. The valuation is for the plan year beginning January 1, 1981 and ending December 31, 1981.

The primary purpose of the valuation is to determine if the contribution rate (currently $1.454 per hour) will continue to be sufficient to provide payments for current retirees and at the same time continue to build a sufficient reserve for future retirees. This is measured by minimum requirements of ERISA's Funding Standard Account.

The contribution for 1981 will be sufficient, if contributed throughout the year for at least 6,070,000 hours. This is the projected number of hours for 1981 based on 4 months experience.

Minimum contribution required according to ERISA regulations (Funding Standard Account)	$8,917,996

For purposes of the Funding Standard Account the contributions will be credited with interest from the date paid. The amount of interest will be approximately $260,000. Therefore, if at least 5,955,000 hours is realized, the contribution with interest will result in a positive balance in the Funding Standard Account as of December 31, 1981.

The calculations for this valuation were based on the benefits in effect as of January 1, 1981 (i.e. $16 standard benefit).

MEIDINGER, INC.

s/s
Gary A. Pines, FSA, MAAA
Vice-President

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SECTION I

REPORT SUMMARY AND ACTUARIAL CERTIFICATION

A. Report Summary

This section of the report summarizes the results of the January 1, 1981 actuarial valuation of the Milwaukee Brewery Worker's Pension Plan. This summary shows the range of contributions and other financial information for the plan year ending December 31, 1981, and provides a comparison with the results of the prior valuation. The development of the various items is shown in the remaining sections of the report.

	Current Valuation as of 1/1/81	Prior Valuation As of 1/1/80
1. Range of Annual Contributions (assuming payments are made on or after 12/31)	$16,840,046 ($2.774)	$16,956,375($2.528)

a. Maximum Tax Deductible	10,422,138 ($1.717)	10,482,121 ($1.563)
b. Normal Cost Plus 30 Year Funding (The Funding Objective)	9,090,553	10,108,935
c. Expected Contribution with interest (6,750,000 hours in 1980, 6,070,000 hours in 1981)	8,917,996 ($1.469)	9,324,780 ($1.390)
d. Minimum Required under ERISA		

The per hour costs in parentheses are based on the assumed 6,070,000 hours in 1981 and actual 6,707,000 hours in 1980.

2. Normal Cost due 1/1	1,155,251 ($ .190)	1,232,468 ($ .184)

3. Unfunded Accrued Liability	108,631,834	109,838,741
4. Assets (including accrued contributions)		
a. Actuarial Valuation Basis	48,433,827	45,018,299
b. Market Value	51,226,568	44,903,061

	Current Valuation as of 1/1/81	Prior Valuation As of 1/1/80
5. Actuarial Present Value of Vested Plan Benefits as of Beginning of Year (determined as required		

for Schedule B to Form 5500, see page 20)	$133,600,030	$129,573,138
a. Total Vested Liability	82,373,462	84,670,077
b. Unfunded Vested Liability (5a - 4b)		
6. Number of Participants		
a. Active Participants	3,448	3,675
b. Terminated Participants with Vested Benefits	63	60
c. Retired Participants and Beneficiaries Receiving Payments	2,417	2,278
d. Total	5,928	6,013

B. Actuarial Certification

The information and valuation results shown in this report are to the best of my knowledge, complete and accurate and are based upon:

1. Employee census data submitted by the employers under the plan. This data was not audited by us, but appears to be sufficient and reliable for purposes of the report.

2. Financial data submitted by Citibank and M & I Marshall & Ilsley Bank.

3. Actuarial assumptions which in the aggregate are reasonably related to the experience of the plan and to reasonable expectations, and which represent my best estimate of anticipated experience under the plan.

4. Actuarial method as stated in the report and my interpretation of plan provisions as summarized in the report.

William A. Farquhar FSA, MAAA
Enrolled Actuary (No. 2056)

MEIDINGER INC.

20 North Wacker Drive
Chicago, Illinois 60606
(312) 332-5397
direct line from Milwaukee: 278-0110

SECTION II

VALUATION COMMENTS

A. Census Data

This report is based on the 1/1/81 employee census consisting of 3,448 active participants, 2,417 retired participants and beneficiaries receiving payments, and 63 terminated participants who will be eligible to receive payments in the future, if still living.

A comparison with prior census data is as follows:

	1/1/81 Census	1/1/80 Census	1/1/79 Census	1/1/78 Census
Number of active Participants	3,448	3,675	3,914	4,146

Average Age	44.6 years	44.4 years	44.1 years	44.2 years
Average length of service	16.9 years	16.8 years	16.6 years	16.7 years
Number of Hours for which contributions were made during prior year	6,707,043	7,079,861	7,415,341	8,227,597
	5.3% decrease	4.5% decrease	10.4% decrease	

A summary of the change in census for the active participants over the past year was as follows:

		Number of Participants
1.	Participants as of 1/1/80	3,675
2.	Terminations	265

3.	Participants who remained throughout the year (1-2)	3,410
4.	New participants in 1980	38
5.	Participants as of 1/1/81 (3 + 4)	3,448

B. Financial Results

The trust fund produced an estimated rate of return of 15.3% net of expenses for fiscal 1980.

The actuarial valuation uses a modified figure for the value of assets each year. This figure is known as the Actuary's Value of Assets and is the basis of the asset valuation method. The purpose of this method is to "smooth" fluctuating values. It dampens the swings in the market value. This can be shown by the results over the past few years.

Date	(1) Market Value	(2) Actuary's Value of Assets	(3) Difference (1) - (2)	Estimated Rate of Return on Market Value	Estimated Rate of Return on Actuary's Value
12/31/80	$51,226,568	$48,433,827	$ 2,792,741	15.3%	8.6%
12/31/79	44,903,061	45,018,299	-115,238	10.0	4.9
12/31/78	41,405,635	43,441,683	-2,036,048	8.4	3.7
12/31/77	37,247,217	40,872,675	-3,625,458	-7.3	2.6
12/31/76	38,735,663	38,506,135	229,528	15.3	5.1

12/31/75	31,012,830	33,944,684	-2,931,854	23.8	2.7
12/31/74	23,070,802	30,918,188	-7,847,386	-27.3	-1.5

Compound rate of return at market value (7 years): 4.1%

This asset valuation method produced a decrease in the minimum contribution of about $77,000 (1.3¢ per hour).

C. Results of Valuation

As shown on the Foreword, a contribution in 1981 for over 5,955,000 hours is sufficient to meet ERISA's minimum requirements.

The expected contribution for 1981 with interest is projected to be based on 6,070,000 hours and is calculated as follows:

$1.454 x 6,070,000 hours x 1.03 = $9,090,553.

D. Other Actuarial Assumptions

In addition to the valuation of assets method and the interest rate assumption (as analyzed under financial results), the experience of the following two assumptions should be noted:

1. Contribution Amount

It was assumed that the $1.454 per hour contribution rate would be contributed for 6,750,000 hours in 1980. This produced an expected annual contribution with interest of $10,108,935 (6,750,000 x 1.454 x 1.03). The actual amount contributed with interest in 1980 was $9,977,622, or $131,313 less than the expected.

2. Retirement Rate (for normal and early retirement)

Shown on the following page is an updated table noting the "expected" number of retirements according to the actuarial assumption and the "actual" number of retirements. If the "actual" is equal to the "expected" there will be no actuarial gains or losses and no effect on the cost of the Plan.

Year Born	1977		1978		1979		1980		1981	
	Exp.	Act.	Exp.	Act.	Exp.	Act.	Exp.	Act.	Exp.	Act.
1911										
12	35	32								
13	16	16	35	35						
14	17	19	12	10	28	26	2	4	2	
15	38	31	20	27	15	12	33	21	12	
16	22	13	33	34	14	24	9	11	24	
17	27	14	25	15	30	21	19	27	12	
18	17	21	26	24	20	21	23	27	17	
19	12	18	14	16	22	14	15	14	27	
20	9	11	10	11	13	19	16	11	15	
21	5	11	7	8	10	9	16	13	17	
22	2	9	4	3	7	9	12	17	13	

Year Born	1977		1978		1979		1980		1981	
	Exp.	Act.	Exp.	Act.	Exp.	Act.	Exp.	Act.	Exp.	Act.
23			1	7	4	5	6	8	11	
24					1	8	7	9	6	
25							6	18	8	
26									4	
Total	200	195	187	190	164	168	164	180	168	

The "actual" number of retirements was fairly close to the "expected". In 1980 there were slightly more "actual" retirements after age 60, but significantly more than expected at the earlier retirement ages. Overall, this had the effect of producing actuarial losses because of the unexpected number of employees receiving the "supplemental" and "incentive" benefits.

E. Timing of Contributions

Requirements on the timing of contributions are currently as follows:

Satisfaction of ERISA's minimum contribution requirements (under the Funding Standard Account) --

Contribution must be paid within 2 1/2 months after the end of the plan year. But the Internal Revenue Service, in Temporary Regulation Section 11.412(c)-12, has extended this payment period for an additional 6 months. Thus, the plan has until 9/15/82, which is 8 1/2 months after the end of the plan year, to satisfy ERISA's minimum funding requirements.

SECTION III

ACTUARIAL VALUATION RESULTS

This section of the report provides information with respect to the valuation of plan assets and plan liabilities. The information shown is organized as follows:

Plan Assets

A. Financial Summary of Trust Fund for Plan Year Ending 12/31/80

B. Development of Valuation Assets

Plan Liabilities

C. Actuarial Valuation to Determine the Normal Cost and Unfunded Accrued Liability

D. Actuarial Gains and Losses

E. Schedule of Amortization Payments

Plan Contribution Levels

F. Funding Standard Account -- Minimum Contribution

G. Determination of Range of Annual Contributions

Vested and Non-vested Liabilities

H. Actuarial Value of Unfunded Vested Accrued Benefits and Non-vested Accrued Benefits

I. Present Value of Vested Benefits and Non-vested Accrued Benefits on an "On-going Plan Basis".

The valuation of benefits under a retirement plan is a determination of the present value of the future benefit amounts that will be paid from the assets of the plan. The usual technique, and the one employed in this valuation, is to determine this present value with respect to only the present poarticipants -- active, retired and terminated with vested rights. No specific allowance is made for future entrants to the plan. The valuation technique involves a projection of the future amounts that may be payable to each participant, a determination of the probability that each such payment will have to be made, and a computation of the present value of the probable future payments.

Financial Summary of Trust Fund for Plan Year Ending 12/31/80
(Market Value)

1.	Assets 1/1/80	$44,903,061.06
2.	Income and Expenditures 1/1/80 to 12/31/80	
	A. Income:	
	Employer Contribution Received	
	Miller $4,284,243.72*	
	Pabst 3,208,382.41	
	Schlitz 2,270,012.43	
	$9,762,638.56*	
	Receivable 12/31/80	
	Miller $ 315,200.32	
	Pabst 172,174.39	
	Schlitz 636.42	
	$ 488,011.13	
	Less receivable 1/1/80	
	Miller $ 272,748.35	
	Pabst 147,048.05	
	Schlitz 126,309.50	
	$ 546,105.90	
	$9,704,543.79	
	Investment Income	
	Interest received $2,781,620.78	
	Dividends received 694,172.35	
	Receivable 12/31/80 809,787.92	
	Less Receivable 1/1/80 607,675.11	
	3,677,905.94	
	Realized loss on sale of securities -338,480.25	
	Changes in unrealized gain 3,584,200.50	
	Settlement of Singer Securities class action suit 3,069.47	
	Miscellaneous 2,228.05	

Total Income	$16,633,467.50

*Including $7,317.57 receivable as of 1/1/80 for Miller not previously recorded.

Financial Summary (Continued)

Total income (from preceding page)		$16,633,467.50
b. Expenditures		
Benefit payments	$10,059,477.91	
Trustee fee	117,728.59	
Fee for administrative, actuarial & check writing	74,880.80	
Post office box rental	28.00	
Legal fee	15,691.15	
Accountant's fee	4,715.00	
Investment counseling fee	17,758.62	
Miscellaneous (includes $3,109.00 PBGC-1 premium; $10,425.00 bonding & fiduciary liability insurance; $5,631.92 stationery, printing and mailing expenses; $325.00 International Foundation dues; and $189.59 error on bond sale)	19,680.51	
Total Expenditures	10,309,960.58	
C. Excess of income over expenditures (a - b)		$6,323,506.92

3.	Assets 12/31/80 (1 + 2c)	$51,226,567.98
4.	Assets 12/31/80 (Market Value)	
	Cash:	
	Petty cash	$ 247.12
	M & I checking account	10,378.92
	Citibank	0
	Short Term Note	492,031.25
	U.S. Treasury Bills	1,763,078.00
	Commingled Employee Benefit Funds:	
	Short Term Fund	3,808,814.14
	Liquid Reserve Fund	505,553.15
	U. S. Bonds, Notes & Agencies	7,662,566.80
	Corporate Bonds & Notes	14,875,184.29
	Foreign Bond	71,812.80
	Mortgage	6,438.50
	Convertible Preferred Stock	112,500.00
	Common Stock	20,168,532.38
	Receivables:	
	Investment Income	809,787.92
	Proceeds of Unsettled Sales	460,961.57

Contributions	488,011.13
Payables: Cost of Unsettled Purchases	-9,330.00
Total	$ 51,226,567.97

B. Development of Valuation Assets
(Actuarial Assumption for Valuation of Assets)

In order to smooth the volatile movement of the market value of assets from year to year, an "Actuary's Value of Assets" is determined each year. This value is used as the acturial assumption for the valuation of assets.

It is calculated by projecting the beginning of the year value to the end of the year at the valuation interest rate and adding the actual contribution less benefit payments that accumulate during the year, also adjusted for interest. The resulting figure is then adjusted by 20% of the difference from the actual market value.

The calculation for the current year's valuation is shown below.

1.	Actuary's Value of Assets 12/31/79		$ 45,018,299
2.	Expected increases in Actuary's Value 12/31/79 to 12/31/80 (based on actuarial assumption (7%) as to rate of return on investments)		
	a. Contributions	$9,704,544	
	b. Benefit payments	10,059,478	
	c. Expected investment income		

	using assumed 7% rate of return on:		
	i. Actuary's Value	$3,151,281	
	ii. Contributions	273,078	
	iii. Benefit payments	352,082	
	iv. Total (i + ii - iii)		3,072,277
	d. Net expected increase in Actuary's Value (a - b + c)		2,717,343
3.	Expected Actuary's Value of Assets 12/31/80 (1 + 2d)		$47,735,642
4.	Actual market value of assets 12/31/80		$51,226,568
5.	Adjustment to smooth investment gains and losses		
	a. Net gains (losses) (4 - 3)		3,490,926
	b. Current amount of gain (loss) to be recognized in 12/31/80 Actuary's Value (20% of 5a)		+698,185
6.	Actuary's Value of Assets 12/31/80 (3 + 5b)		$48,433,827

The determined Actuary's Value of Assets must be no less than 80% nor nore than 120% of market value. As of 12/31/80, the Actuary's Value of Assets is 94.5% of market value.

C. Acturial Valuation to Determine the Normal Cost and Unfunded Accrued Liability (Entry Age Normal)

		1981 Figures	1980 Figures (for comparison)
1.	Normal cost due 1/1/81		
a.	Normal and early retirement	$ 720,301	
b.	Early retirement supplement	80,070	
c.	Incentive retirement	68,151	
d.	Disability retirement	99,514	
e.	Vested retirement	34,668	
f.	Automatic survivor	56,533	
g.	Pop-back at age 65	96,014	
e.	Total	$ 1,155,251	$ 1,232,468
		($.190/hr)	($.184/hr)
2.	Accrued liability 1/1/81		
a.	Active participants		
	Normal and early retirement	$54,010,899	
	Early retirement supplement	4,201,177	
	Incentive retirement	3,226,023	
	Disability retirement	4,018,047	

	Vested retirement	372,288	
	Automatic survivor	2,371,269	
	Pop-back at age 65	5,739,559	
	Total -- active	$73,939,262	$ 79,609,630
b.	Inactive participants		
	Payable for life of participant	$30,526,580	
	Payable to participant while living for a temporary period (incentive and supplement)	4,613,069	
	Payable on a joint and survivor basis	42,393,064	
	Payable for life of a survivor		
	-- of a pensioner	3,547,295	
	-- of an active participant	1,713,368	
	Deferred for later commencement	333,023	
	Total -- inactive	$ 83,126,399	$ 75,247,410
c.	Total -- active and inactive (a + b)	157,065,661	154,857,040
3.	Actuary's Value of Assets 12/31/80	48,433,827	45,018,299

4.	Unfunded accrued liability 1/1/81 (2c - 3)	$108,631,834	$109,838,741

Cents per hour costs are based on the assumed 6,070,000 hours in 1981 and actual 6,707,000 hours in 1980.

D. Determination of Actuarial Gain (Loss) for Plan Year Ending 12/31/80

1. Liability Gain (Loss)

a.	Accrued Liability 1/1/80	$154,857,040
b.	Normal Cost due 1/1/80	1,232,468
c.	1980 benefit payments	10,059,478
d.	Interest at 7% to 12/31/80 on:	
	i. Accrued liability	10,839,993
	ii. Normal cost	86,273
	iii. Benefit payments	352,082
e.	Expected accrued liability 12/31/80 (a + b - c + d(i) + d(ii) - d(iii))	156,604,214
f.	Actual accrued liability 12/31/80	157,065,661
g.	Liability gain (loss) (e - f)	-461,447

2.	Asset Gain (Loss) (see page 12, line 5b)	$ +698,185
3.	Total Actuarial Gain (Loss) (1g + 2)	$ 236,738

Gains (i.e., liabilities less than expected) and losses (i.e., liabilities greater than expected) will occur from year to year because the experience will not be exactly the same as the acturial assumptions. In general, gains will occur from the following sources:

(a) Investment earnings greater than those estimated using the valuation interest rate.

(b) Mortality higher than the assumed rate.

(c) Withdrawals higher than the assumed rate.

(d) Disability lower than the assumed rate.

(e) Retirements occurring later than the assumed average retirement age.

Losses will occur for the opposite reasons and all such gains and losses will be reflected by changes in the unfunded accrued liability.

E. Schedule of Amortization Payments

1. For Maximum Annual Contribution

Regulations have been published to provide for determining the deductible limits under section 404(a)(1)(A) of the Internal Revenue Code. Under the regulations, 10 year amortization bases must be established to reflect the plan on the ERISA compliance date, plan amendments, changes in actuarial assumptions, and acturial gains and losses.

The Regulations allow a new 10-year amortization base to be established. This procedure was followed as of 1/1/80.

	Unfunded Accrued Liability Amount	Established	Amortization Payment Amort. Period	Payment on 1/1	Outstanding Balance on 1/1/81
a. Unfunded accrued liability established 1/1/80	$109,838,741	1/1/80	10	$14,614,61	$108,868,572

b. Experience gain during 1980	-236,738	1/1/81	10	-31,501	-236,738
				$14,583,11	$108,631,834

Schedule of Amortization Payments (continued)

2. For Funding Standard Account

ERISA requires that in determining the status of the funding standard account actuarial gains and losses be amortized over 15 years and increases and decreases in the accrued liability due to plan amendments be amortized over 30 years. The initial accrued liability on the date the funding standard account was established is amortized over 40 years.

		Unfunded Accrued Liability		Amortization Payment		
		Amount	Established	Amort. Period	Payment on 1/1	Outstanding Balance on 1/1/81
Charges						
a.	Initial unfunded accrued liability (UAL)	$90,838,633	1/1/76	40	$ 6,280,294	$87,009,454
b.	Increase in UAL due to actuarial loss in 1976	1,095,622	1/1/77	20	94,874	959,019

c.	Increase in UAL due to plan change	24,847,222	1/1/78	40	1,730,234	24,284,156
d.	Increase in UAL due to actuarial loss in 1977	2,461,222	1/1/78	20	214,497	2,240,723
e.	Increase in UAL due to actuarial loss in 1978	1,385,263	1/1/79	20	121,473	1,307,428
f.	Increase in UAL due to plan change	23,084,183	1/1/80	40	1,618,239	22,968,560
g.	Increase in UAL due to actuarial loss in 1979	1,664,074	1/1/80	20	146,796	1,623,487
	Total charges 1/1/81				$10,206,405	$140,392,825
Credits:						
a.	Decrease due to assumption change	$31,201,734	1/1/80	30	$ 2,349,948	$30,871,410

b.	Decrease due to 1980 experience gain	236,738	1/1/81	15	24,292	236,730
	Total charges 1/1/81				$ 2,374,240	31,108,140

Fund Standard Account

The funding standard account is used to determine whether the plan meets the minimum funding requirements under ERISA. The funding standard account for the plan year ending December 31, 1981, and the two prior years, is as follows:

		Plan Year Ending December 31		
		1979	1980	1981
1.	Charges to funding standard account:			
a.	Prior year funding deficiency 1/1	--	--	--
b.	Normal cost due 1/1	$1,936,399	$ 1,232,468	$ 1,155,251
c.	Amortization charges due 1/1 (see page 16)	6,798,607	10,206,407	10,206,407
d.	Interest on (a), (b) and (c)	436,750	800,721	795,316
e.	Total charges, sum of (a)			

	through (d)	$9,171,756	$12,239,596	$12,156,974
2.	Credits to funding standard account:			
	a. Prior year credit balance 1/1	$1,070,163	$ 374,179	$ 652,842
	b. Contributions	8,261,972	9,704,544	0
	c. Amortization credits due 1/1 (see page 16)	--	2,349,948	2,374,240
	d. Interest on (a), (b) and (c)	213,800	463,767	211,896
	e. Total credits, sum of (a) through (d)	$9,545,935	$12,892,438	$ 3,238,978
3.	Balance as of 12/31:			
	a. Credit balance, excess, if any, of 2(e) over 1(e)	$ 374,179	$ 652,842	--
	b. Funding deficiency, excess, if any, of 1(e) over 2(e)	--	--	$ 8,917,996

As of 12/31/81 there will be an accumulated funding deficiency of $8,917,996. A contribution of at least this amount is required for the plan year ending 12/31/81 to avoid the penalties under ERISA.

G. Determination of the Range of Annual Contributions

	1981 Contribution	1980 Contribution (for comparison)
Maximum Deductible Contribution		
a. Normal cost due 1/1/81	$ 1,155,251	
b. 10 year amortization payments (see page 15)	14,583,110	
c. Interest on above to 12/31/81	1,101,685	
Maximum deductible 1981 contribution (a + b + c)	$16,840,046 ($2.774/hr)	$16,956,375 ($2.528/hr)

Funding Objective:
"30-year Funding" Contribution
(The amount to pay the normal cost
and to amortize the 1/1/81 unfunded

accrued liability over 26 years)

a. Normal cost due 1/1/81	$ 1,155,251	
b. 26 year amortization payment of the 1/1/81 unfunded accrued liability	8,585,065	
c. Interest on above to 12/31/81	681,822	
"30 year funding" contribution level (a + b + c)	$10,422,138 ($1.717/hr)	$10,482,121 ($1.563/hr)
Funding Standard Account Minimum contribution required under ERISA (see page 17)	$ 8,917,996 ($1.469/hr)	$ 9,324,780 ($1.390/hr)
Expected Contribution with Interest		
6,070,000 hours x $1.454 x 1.03 =	$ 9,090,553	$10,108,935

(9.5% less hours than 1980) (actual
contribution

for

with interest

1980 was
$9,977,622)

The cents per hour costs in parentheses are based on the assumed 6,070,000 hours in 1981 and actual 6,707,000 hours in 1980.

H. Actuarial Value of Unfunded Vested Accrued Benefits

The actuarial value of accrued benefits is the present value of all benefits that have been earned for service up to a certain date. The calculation of the actuarial value of vested accrued benefits (i.e. vested liability) is based on only those participants who have met the vesting eligibility requirements. As of 1/1/81 it assumes that all active participants eligible for a vested benefit, of whom there are 1,874, terminated at the $16.00 standard benefit.

Vested benefits include normal retirement (5/65), early retirement (10/55) and vested retirement (10/-).

The actuarial value of unfunded vested accrued benefits or "unfunded vested liability" figure shown on this page provides one measure of how the plan's assets compare with current liability in a plan termination situation.

	7% Valuation Interest Assumption	PBGC Assumption* (as of 1/1/81)
1. Vested Liability for Basic Benefits as of 1/1/81	$125,925,618	$106,963,885

2.	Market Value of Assets as of 1/1/81	52,226,568	51,226,568
3.	Unfunded Vested Liability for Basic Benefits (1 - 2)	74,699,050	55,737,317
4.	Vested Liability for Supplmental Benefits**	27,281,641	24,820,415
5.	Unfunded Vested Liability for all benefits (3 + 4)	$101,980,691	$ 80,557,732

*PBGC interest rate of 9 1/2% for immediate annuities and 8 3/4% grading down to 5% for deferred annuities.

**Supplemental Benefits include the Supplemental, Incentive and Pop-back benefits.

I. Actuarial Present Value of Accumulated Plan Benefits

The actuarial value of accumulated plan benefits is the present value of all benefits that have been earned for service up to the valuation date. Previous valuation reports have referred to this as the actuarial value of accrued plan benefits on an ongoing basis. The terminology and presentation have been revised to comply with the requirements of FASB #35 and #36. This information must also be disclosed on the Schedule B attachment to form 5500 for plans with 100 or more participants, as required by Internal Revenue Service regulations. The 1980 Schedule B, however, retains the previous terminology of present value of accrued benefits, although it requires the same value and "ongoing plan basis" method of calculation.

The actuarial value of accrued benefits on a plan termination basis, presented for comparison, is included on page 19.

The present value of accumulated plan benefits must be broken down by participant category, i.e., active, retired, etc. The calculations must be done on an "ongoing basis." The calculations are made as of the beginning of the plan year as required for Schedule B disclosure. FASB #35 and #36 permit beginning of year values.

The calculations are based on the valuation interest assumption of 7%.

STATEMENT OF ACCUMULATED PLAN BENEFITS

		January 1, 1981
ACTUARIAL PRESENT VALUE OF ACCUMULATED PLAN BENEFITS		
1.	Vested benefits	
	a. Participants currently receiving payments	$ 82,793,376
	b. Other participants	50,806,654
	c. Total (a + b)	133,600,030
2.	Nonvested benefits	8,036,392
3.	Total actuarial present value of accumulated plan benefits (1c + 2)	$141,636,422

The results of the ongoing calculation do not affect responsibilities with regard to th Pension Benefit Guarantee Corporation, which are defined in terms of a plan termination basis calculation.

SECTION IV

ACTUARIAL ASSUMPTIONS AND METHOD, PLAN SUMMARY, AND PARTICIPANT DATA

This section of the report presents the actuarial assumptions and method used in the valuation, a summary of the major provisions of the plan, and a tabulation of the employee data used in the calculations.

A. Actuarial Assumptions

The actuarial assumptions used in this year's valuation are the same as in the previous valuation and are as follows:

1. Investment Return — 7%, compounded annually

2. Mortality

   a. Active Participants* — UP-1984 Mortality Table (set forward 1 year)

   b. Terminated Participants — UP-1984 Mortality Table (set back 4 years for females and set forward 1 year for males)

   c. Disabled Participants — 1956 Disability Annuitants Mortality Table set forward 1 year age and set back 1 year duration

3. Withdrawal* — Rates based on length of service determined from a prior experience analysis. Termination rates stop at age 54. (T-11 adj.)

4. Retirement Rates — Rates of retirement as follows:

Attained Age	Percentage of Remaining Active Participants Assumed to Retire
55	3%
56	5

57	5
58	9
59	12
60	15
61	15
62	30
63	30
64	30
65	100

*See attached table for rates.

5.	Disability Rates*	Moderate rates of becoming totally and permanentaly disabled varying by age
6.	Spouse's Benefit	60% will elect Joint and Survivor option at retirement with spouse, and 5% will elect Co-pensioner option. Spouse or Co-pensioner 3 years younger
7.	Expenses	No special allowance.
8.	Asset Valuation Technique	Moving average of marker values, which accounts for 20% of the deviation between the expected market value (according to actuarial assumptions) and the actual market value. The determined value of assets will not be less than 80% nor more than 120% of the market value of assets as of the date of determination.

9. Employee Included — All employees with one or more years of Credited Service

*See attached table for rates.

B. Actuarial Cost Method (Entry Age Normal)

An actuarial cost method is a technique which determines the amount and incidence of the contributions of the plan. The actuarial cost method attempts to spread the cost of the forecasted liabilities into the future and put the costs into contributions that are on a budgetable basis. The actuarial cost method used in the actuarial valuation of this plan is the Entry Age Normal cost method as described below.

Under the Entry Age Normal cost method, the costs are split into two portions, the normal cost and the accrued liability.

The normal cost is expressed as a level amount (depending primarily on age at employment), which if it is paid as a contribution to the plan (each year from the date each employee is hired to the date the employee terminates employment by reason of retirement, death or withdrawal), would pay for all benefits provided by the plan (if actual experience is the same as is assumed in the actuarial assumptions).

The accrued liability is the actuarial present value of future benefits less the actuarial present value of future normal costs accruals, both calculated at the valuation date.

The difference between the accrued liability and the assets at the valuation date is the unfunded accrued liability. Each year the difference between the expected unfunded accrued liability, based on actuarial assumptions being exactly realized, and the actual unfunded accrued liability is the actuarial gain (loss) for the previous year.

C. Summary of Major Plan Provisions

Employer -- An employing unit which is a party to the 1953 Collective Bargaining Agreement or any successor collective bargaining agreement with the Union and which is contributing to the Fund. Currently:

Miller Brewing Company
Pabst Brewing Company
Jos. Schlitz Brewing Company

Union -- Brewery Workers Local Union No. 9 D.A.L.U., AFL-CIO.

Effective Date -- 3/1/54, most recently amended 6/1/79.

Employee -- Any person who on or after 3/1/53 is employed by the Employer or is on the seniority list of the Employer in the bargaining unit represented by the Union.

Past Service -- Credited to an Employee who is employed on 6/1/77 equal to 1/1/78 credited service under pre-6/1/77 plan.

Vesting Service -- Total of Past Service and Future Service for Vesting (one year for each year after 1977 in which 1,000 Hours of Work are accrued - not less than Future Service for Benefit. Hour of Work is basically an hour which is directly or indirectly compensated by the Employer.)

Accrual Service -- Total of Past Service and Future Service for Benefits (one year for each year after 1977 in which 1,000 Paid Hours are accrued. Paid Hour is basically an hour directly compensated by the Employer up to 40 hours per week).

Standard Benefit -- A monthly benefit of $16 multiplied by years of Accrual Service.

Normal Retirement -- On retirement after age 65 for those Employees hired prior to age 60.

Disability Retirement -- On establishing total and permanent disability after 10 years of Accrual Service, the Standard Benefit reduced by Workmen's Compensation and disability benefits provided under any program to which the Employer contributes other than Social Security or equivalent State program. Upon attaining age 65, the Standard Benefit is payable.

Early Retirement -- On early retirement after 10 years of Accrual Service and age 55, a monthly benefit equal to the Standard Benefit reduced by 1/240th for each calendar month (not in excess of 60) by which early retirement precedes age 65 and by 1/400 for each calendar month by which early retirement precedes age 60. Upon attainment of age 65, the benefit payable before age 65 shall be increased by the amount of the reduction.

Vested Retirement Benefit -- On termination of employment with 10 years of Vesting Service the Standard Benefit payable at age 65, or a reduced benefit (see Early Retirement) as early as 55. However, the benefit will not be increased at age 65 as under Early Retirement.

Joint and 50% to the Surviving Spouse Option -- Automatic option (unless no spouse or rejected by employee) provides 90% of regular benefit to the employee (± 1/2% for each year the spouse is more than 5 years older or younger than employee) with half of that benefit continued to surviving spouse. Upon death of the spouse before the employee, the amount of the benefit payable shall be determined as if the employee had not elected this option. Option available at benefit commencement date.

Co-pensioner Option -- Upon designation to the Joint Committee of a co-pensioner, provides 83% of regular benefit to the employee (± 1/2% for each year the co-pensioner is older or younger than employee) with half of that benefit continued to surviving co-pensioner. Upon death of the co-pensioner before the employee, the amount of the benefit payable shall be determined as if the employee had not elected this option.

Incentive Retirement -- On early retirement after 10 years of Accrual Service and age 55 (not eligible for Disability Retirement), a monthly benefit of $105 payable until age 65 (not subject to J & S option).

Early Retirement Supplement -- On early retirement after 20 years of Accrual Service and age 55 (not eligible for Disability Retirement), a monthly benefit of $12 multiplied by years of Accrual Service (maximum 35) payable until age 62 or earlier eligibility for Social Security (not aubject to J & S option).

Automatic Survivor Benefit and Designated Co-Pensioner Benefit -- On death after 20 years of Accrual service or age 55 and 10 years Accrual Service and before retirement, pays income to surviving spouse or designated Co-pensioner as if employee had retired and elected the joint and 50% to the surviving spouse option or co-pensioner option. If the age 55 and 10 years of accrual service requirements are not met, the benefit is not increased at the time that the employee would have been age 65 by 100% of the early retirement reduction.

Administration of Plan -- Joint Committee of Employer and Union representatives.

Medium of Funding -- Trust Fund held by The First National City Bank of New York.

D. Participant Data

1. Active Participant Data

Census Data

Attained Age in 1980	Years of Credited Service to 1/1/81											
	1	2	3	4	5-9	10-14	15-19	20-24	25-29	30-34	35 & over	Total
20-24	7	1	9	12	52							81
25-29	8	15	24	42	334							423
30-34	14	11	31	52	273	52	3					436
35-39	10	12	9	29	197	125	65	4				451
40-44	11	5	11	28	126	74	91	31				377
45-49	6	7	9	12	85	40	53	43	18	16		289
50-54		2	4	5	65	37	33	35	51	205	7	444
55-59		1			37	17	33	15	56	356	119	634
60-64					11	4	21	11	34	122	99	302

65 & over					1	1	3	1		4	1	11
Total	56	54	97	180	1,181	350	302	140	159	703	226	3,448

Average Attained Age: 44.6 years

Average Years of Credited Service: 16.9 years

2. Pensioners and Beneficiaries as of 1/1/81 2,417

3. Vested Terminated Participants as of 1/1/81 63

E. Illustrations of Actuarial Assumptions

Tables are shown on the following pages.

Active Life Mortality
(Percent of remaining participants then active)

Age	Mortality Rate	Age	Mortality Rate
18	.14%	43	.31%
19	.13	44	.34
20	.13	45	.38
21	.12	46	.42
22	.11	47	.46
23	.11	48	.51
24	.11	49	.56
25	.11	50	.62
26	.11	51	.69
27	.11	52	.75
28	.11	53	.83
29	.11	54	.90
30	.11	55	.99

31	.12
32	.12
33	.13
34	.14
35	.15
36	.16
37	.18
38	.19
39	.21
40	.23
41	.26
42	.28
56	1.08
57	1.19
58	1.30
59	1.42
60	1.55
61	1.70
62	1.87
63	2.05
64	2.26
65	2.48

UP-84(=1)

Illustration of Assumptions Used in Valuations For Participants Hired at Age 33

(Percent of remaining participants then active)

Age	Withdrawal Rate*	Disability Rate Before Retirement	Retirement Rate
33	50.20%	.04%	
34	29.66	.04	
35	20.03	.04	
36	12.44	.04	
37	7.55	.05	
38	4.51	.05	
39	2.85	.06	
40	1.71	.07	
41	1.47	.08	
42	1.29	.09	
43	1.16	.10	
44	1.05	.12	
45	.96	.14	
46	.89	.16	

47	.83	.18	
48	.78	.12	
49	.74	.16	
50	.70	.30	
51	.66	.35	
52	.62	.41	
53	.58	.48	
54	.56	.56	
55		.64	3%
56		.74	5
57		.86	5
58		.99	9
59		1.14	12
60		1.30	15
61		1.46	15
62		1.68	30
63		1.98	30
64		2.44	30
65			100

*No withdrawals assumed after age 54

Service Table

Illustrating effect of mortality, disability and withdrawal assumptions for age 33 at employment

Participants Age Service	Number of Participants Remaining in Service	Age	Number of Remaining in
33	1,000	58	133
34	497	59	118
35	349	60	101
36	278	61	83
37	243	62	68
38	224	63	45
39	213	64	30
40	207	65	20

41	203
42	199
43	196
44	193
45	190
46	187
47	184
48	181
49	179
50	176
51	173
52	170
53	167
54	164
55	161
56	153
57	143

UP-1984 +1 unloaded, 11 adj. & 13, 12, 59-65

Supreme Court, U.S.
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No. 93-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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51 pp

QUESTION PRESENTED

Whether, pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), an employer withdrawing from a multiemployer defined benefit plan is required to make payments to the plan which include interest on the amount of the employer's allocable share of the plan's unfunded vested benefits for the full year from a) the date MPPAA directs the plan use to calculate the amount of the unfunded benefits allocable to that employer to b) the date MPPAA directs the plan to presume, for the purpose of determining the number of level annual payments necessary to amortize such amount, that the employer will make its first payment.

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No. 93-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

Petitioner, Milwaukee Brewery Workers' Pension Plan ("Plan"), respectfully submits this Brief urging reversal of the judgment of the United States Court of Appeals for the Seventh Circuit rendered on August 13, 1993.

OPINIONS BELOW

Pursuant to section 4221(a)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1401(a)(1) (1985), the parties initially submitted to arbitration their dispute relating to the amount of the Jos. Schlitz Brewing Company's ("Schlitz")[1] withdrawal liability. The arbitrator issued his Award and Opinion on July 7, 1988. It is reported at 9 Employee Benefits Cas. (BNA) 2385 (1988) and is included in the Appendix submitted with the Petition for Writ of Certiorari ("P.A.") as Exhibit E. The arbitrator issued his Final Award on August 24, 1988. It is not reported. The Final Award is included in P.A. as Exhibit F.

The United States District Court for the Eastern District of Wisconsin ("District Court") rendered a series of orders and opinions. On June 6, 1991, the District Court issued a decision and order confirming in part and vacating and modifying in part the arbitrator's Final Award. Based upon that decision and order, judgment was entered on June 6, 1991. The June 6, 1991 decision and order is unpublished. It is included in the Joint Appendix ("J.A.") at 25. On June 3, 1992 and October 20, 1992, the District Court issued orders disposing of issues raised by the Plan's timely Motion to Amend Judgment filed under Rule 59(e) of the Federal Rules of Civil Procedure. In these orders the

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[1] In accordance with Rule 14.1(b) of the United States Supreme Court, all parties to the proceeding in the Seventh Circuit appear in the caption of this case. Subsequent to the time it withdrew from the Plan, the Stroh Brewery Company acquired Schlitz and assumed its liability to the Plan. In addition to the Respondents, the Miller Brewing Company ("Miller") and Pabst Brewing Company ("Pabst") were participating employers in the Plan. All participants in the Plan are members of United Auto Workers Local No. 9, A.F.L.-C.I.O. For purposes of clarity, the Plan will refer only to Schlitz in this Brief.

District Court quantified Respondents' additional liability to the Plan and awarded the Plan pre-judgment and post-judgment interest on Respondents' additional liability. The June 3, 1992 order is not reported. It is included in the P.A. as Exhibit C. The October 20, 1992 order is not reported. It is included in the P.A. as Exhibit D.

The opinion from the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") is reported at *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993). It is included in the P.A. as Exhibit A.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 (1992), 9 U.S.C. § 9 (1991) and 29 U.S.C. § 1401(b)(3) (1991) to review the arbitrator's Final Award. Within 30 days after the arbitrator's Final Award, on August 29, 1988, the Respondents filed a complaint seeking confirmation of the Arbitrator's Award. The Plan filed a counterclaim asking that the Award be vacated and modified. The District Court entered judgment on June 6, 1991. On June 20, 1991, the Plan filed a timely Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Through orders issued June 3, 1992 and October 20, 1992, the District Court disposed of issues raised in the Rule 59(e) Motion. Although the District Court did not enter a new judgment, the Seventh Circuit found it had jurisdiction because the parties had waived that requirement. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978).

The Plan filed a timely Notice of Appeal on November 17, 1992; Respondents filed a Notice of Cross-Appeal on November 25, 1992. The Seventh Circuit had jurisdiction

pursuant to 28 U.S.C. § 1291 (1992). The Seventh Circuit issued its opinion on August 13, 1993.

On November 12, 1993, in accordance with Supreme Court Rules 13, 14 and 29, the Plan filed a timely Petition for Writ of Certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1993). On June 27, 1994, this Court granted the Plan's Petition for Writ of Certiorari limited to Question 1 presented in the Petition.

STATUTES INVOLVED

Section 4219(c)(1)(A) of ERISA, as amended, 29 U.S.C. § 1399(c)(1)(A) provides as follows:

> **(1)(A)(i)** Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).
>
> (ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

The following statutes are contained in the P.A. as Exhibit G and pursuant to Supreme Court Rule 26.1 have not been re-printed: Section 4211 of ERISA, as amended; 29 U.S.C. § 1391. P.A. at E-1. Section 4221 of ERISA, as amended; 29 U.S.C. § 1401. P.A. at G-17.

STATEMENT OF CASE

The dispute between the Plan and Schlitz originated in late 1981 when Schlitz objected on numerous bases to the Plan's calculation of Schlitz' withdrawal liability. The dispute has now evolved into a single issue. In section 4211 of ERISA, as amended, 29 U.S.C. § 1391, Congress instructs multiemployer plan fiduciaries to determine the amount of unfunded vested benefits allocable to a withdrawing employer based on the plan's total unfunded vested benefits and on the value of the plan's assets as of the last day of the plan year preceding withdrawal. In section 4219(c)(1)(A)(i),[2] Congress requires a withdrawing employer to make payments to the plan over the period of years necessary to amortize the amount of the withdrawing employer's allocable share of the plan's unfunded vested benefits in level annual payments calculated **as if** the first payment were made on the first day of the plan year following the year in which the withdrawal occurs. 29 U.S.C. § 1399(c)(1)(A)(i). Section 4219(c)(1)(A)(ii) provides that determination of the amortization period shall be based upon the assumptions used for the most recent actuarial valuation for the plan. 29 U.S.C. § 1399 (c)(1)(A)(ii).

The Plan asserts that section 4219(c)(1)(A) requires Schlitz to make payments which include interest on the amount of the unfunded vested benefits allocated to Schlitz from December 31, 1980, the date used to calculate that amount until the amount is amortized fully in level annual

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[2] Except as otherwise noted, references to specific sections of a statute are references to that section in ERISA, as amended by MPPAA.

payments. Schlitz objected to paying any interest on the amount of unfunded vested benefits allocated to it before the date when Congress instructed the Plan to presume Schlitz would make its first payment—January 1, 1982. The arbitrator and the Seventh Circuit agreed with Schlitz. The District Court, however, concluded that the Plan should include interest for the entire period beginning with the date used to determine the amount of unfunded vested benefits through the date the amount is fully paid.[3] In this case, the Solicitor General has endorsed the Plan's reading

[3] The Fourth Circuit agrees with Schlitz, the arbitrator and the Seventh Circuit. *Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l. Pension*, 974 F.2d 528 (4th Cir. 1992). The Third Circuit concurs with the Plan and the District Court. *Huber v. Casablanca Indus. Inc.*, 916 F.2d 85 (3d Cir. 1990). *But in Colteryann Dairy, Inc. v. Western Pennsylvania Teamsters Fund*, 16 Employee Benefits Cas. (BNA) 2100, 2104 (W.D. Pa. 1993), the court cited *Huber* as permitting the plan to include interest only for the period from withdrawal to the presumed first payment date. This case was affirmed without opinion. *Colteryann Dairy, Inc. v. Western Pennsylvania Teamsters and Employees Pension Fund*, 8 F.3d 10 (3d Cir. 1993). A careful reading of *Huber* confirms that the court held a withdrawing employer is required to pay interest for the full year between the date used for calculating the amount of unfunded benefits and the date the presumed first payment is made. The court did not allow additional interest for the period from the presumed first payment to the date the actual payment was made. *Huber*, 916 F.2d at 99. The reported arbitration decisions on this issue are also split. *See Lommis Armored, Inc. v. Central States Pension Fund*, 8 Employee Benefits Cas. (BNA) 1899, 1921 (1987) (interest for full year of withdrawal allowed); *Carnation Co., Inc. v. Central States Pension Fund*, 9 Employee Benefits Cas. 1409, 1448 (1988) (no interest permitted before date of withdrawal); *Du Art & Technicolor v. Motion Picture Local 702 Pension Fund*, 10 Employee Benefits Cas. 1317 (1987) (interest for full year included); *The Sherwin Williams Co. v. New York State Teamsters Conference Pension and Retirement Fund*, 17 Employee Benefits Cas. 2725 (1994) (no interest before presumed first payment date).

of the provision at issue. Brief for the United States As *Amicus Curiae*, at 16-20.

The facts relevant to this issue are essentially undisputed. To place this issue in context, the Plan will: (1) review the relevant terms of the Plan; (2) discuss the evolution of the federal statutes which have been enacted to address the problems with the funding of defined benefit plans, particularly multiemployer plans; (3) describe the events in 1981 involving Schlitz and the Plan; (4) describe the method utilized by the Plan to determine the amount and number of Schlitz' payments to the Plan; and (5) discuss the relevant portions of the various opinions, orders and awards by the arbitrator, the District Court and the Seventh Circuit.

1. THE PLAN

The Plan is a multiemployer defined benefit pension plan established by an agreement dated August 16, 1954, between Brewery Workers' Local Union No. 9 D.A.L.U. (now U.A.W.), A.F.L.-C.I.O. (Local 9) and several companies which had operations located in or near Milwaukee, Wisconsin engaged in the production and sale of beer. (Statement of Facts at ¶ 2, 5, 6; P.A. at E-3).[4] The Plan, which was amended in its entirety on June 1, 1979, provides certain specified benefits to employees of any employer in the bargaining unit. (Plan Ex. 64; J.A. at 97-124).[5] Length of service dictates the qualifications for and amount of

[4] The parties submitted a Stipulated Statement of Facts to the arbitrator which was included in the arbitrator's Opinion and Award (P.A. at E-3).

[5] The Exhibits were introduced before the arbitrator. The Exhibits were made part of the record before the District Court and the Seventh Circuit.

benefits earned under the Plan. (Plan. Ex. 64; J.A. at 86-97). The Plan is administered by a joint committee made up of representatives from Local 9 and each contributing employer. (Plan Ex. 64; J.A. at 136).[6]

The Plan required participating employers such as Schlitz to make regular contributions to a fund to provide the benefits set forth in the Plan. (Plan Ex. 64; J.A. at 126). The employers did not guarantee that the fund would be sufficient to pay for the benefits but represented that they believed the fund would meet the full current costs and amortize original past service costs on a level funding basis over a period of 30 years from the date the past service costs were incurred. (Plan Ex. 64; J.A. at 126). Under the Plan, Schlitz agreed to contribute to the fund such amounts as it became obligated to contribute from time to time under a collective bargaining agreement with Local 9 but in no event less than the minimum contribution required by ERISA. (Plan Ex. 64; J.A. at 126). Schlitz was required to make monthly contributions to the Plan within the first ten business days of the month following any month in which Schlitz paid wages to employees covered by the Plan. (Plan Ex. 64; J.A. at 126).[7]

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[6] The parties stipulated that in October 1958, Schlitz was a member of the Milwaukee Brewers' Association ("Association"). (Statement of Fact at 6, 9; P.A. at E-3). The Association was formed to prepare and negotiate collective bargaining agreements with various labor organizations, including Local 9. (Statement of Facts at 7; P.A. at E-3). Although the Association initially had six employer members, by January 1, 1981, only Schlitz, Miller and Pabst remained as members of the Association and continued to contribute to the Plan.

[7] Under the terms of the collective bargaining agreement effective from June 1, 1979 to June 1, 1981, Schlitz agreed to pay to the Plan $9.344 per day for each day worked by each employee covered by the Plan until January 1, 1980, and $11.632 per day

(continued...)

2. FEDERAL STATUTES

When this Plan was established in 1954, there were essentially no federal statutes regulating employer sponsored pension plans. Section 302(c)(5) of the Labor Management Relations Act of 1947 required employers and employees to be equally represented in administration of a pension trust fund, that the fund be for the purpose of paying benefits to employees or their beneficiaries and that the terms be set forth in a written agreement. 29 U.S.C. § 186(c)(5) (1978). In 1954, President Eisenhower sent a message to Congress recommending that Congress initiate a thorough study of welfare and pension funds covered by collective bargaining agreements, with a view to enacting legislation to protect and conserve these funds for the millions of working men and women who are beneficiaries. After four years of hearings, studies and investigation, Congress enacted the 1958 Disclosure Act which did not regulate the plans but required annual reporting to the Labor Department. 29 U.S.C. § 301 *et seq.* (repealed by ERISA, 29 U.S.C. § 1031(a)). *See Malone v. White Motor Corp.*, 435 U.S. 497, 506 (1978) (discussing legislative process leading to 1958 Disclosure Act).

Congress continued to study problems relating to the nation's private pension plans and on September 2, 1974 it enacted ERISA. In enacting ERISA, Congress specifically found that because of a lack of vesting provisions, inadequate minimum funding standards and termination of plans

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[7] (...continued)

for each employee from January 1, 1980 to June 1, 1981. (Schlitz Ex. 1; Plan Ex. 150 at 27-28). Schlitz' required contribution to the Plan under the collective bargaining agreement was limited to $46.72 per week for each employee until January 1, 1980 and $58.16 per employee per week until June 1, 1981. (Schlitz Ex. 1; Plan Ex. 150 at 27-28).

before requisite funds had accumulated, many employees with long years of service and their beneficiaries had been deprived of anticipated benefits. 29 U.S.C. § 1001(a); *See Nachman Corp. v. Pension Benefit & Guar. Corp.*, 446 U.S. 359, 361 (1980) (discussing congressional investigation and policies). Congress declared that it was the policy of ERISA, among other things, to protect the interest of participants in private pension plans and their beneficiaries. 29 U.S.C. § 1001(c). As this Court first stated in *Nachman*: "Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement, and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." 446 U.S. at 375.[8]

Through ERISA, Congress imposes on the Plan minimum participation standards, 29 U.S.C. § 1052; minimum vesting standards, 29 U.S.C. § 1053 and minimum funding standards, 29 U.S.C. § 1082. ERISA requires the Plan to establish a funding standard account. 29 U.S.C. § 1082(b)(1). Congress directs the Plan to credit the account with certain contributions to the Plan, 29 U.S.C. § 1082(b)(3), and to charge the account with certain costs, including the normal costs of the Plan for the Plan year plus amounts necessary to amortize in equal annual installments certain unfunded liabilities for employees' past service. 29 U.S.C. § 1082(b)(2). In order to satisfy the minimum funding standard at the end of the Plan year, the Plan may not have an accumulated funding deficiency. 29 U.S.C. § 1082(A)(1). If an accumulated funding deficiency occurs, under the terms of the Plan, Schlitz and the other participating employers would be required to make additional contributions to meet the minimum funding standards required by ERISA (Plan. Ex. 64; J.A. at 126).[9]

[8] This Court has repeatedly acknowledged that protecting the employees and their beneficiaries is among the principal purposes of ERISA. *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 721 (1984); *Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 569 (1985); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 212 (1986); *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2271 (1993).

Recognizing ERISA did not achieve fully the goal of protecting participants and beneficiaries in multiemployer plans, in 1977 Congress directed the Pension Benefit Guaranty Corporation ("PBGC") to prepare a comprehensive report analyzing the problems faced by multiemployer plans and recommending appropriate legislative action. *See* S. Rep. No. 95-510 at 1-4 (1977), U.S. Code Cong. & Admin. News, 1977, at 4129; H.R. Rep. No. 95-706, at 1 (1977); *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 721 (1984). In its report issued July 1, 1978, Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214 (1978), the PBGC noted that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminated their participation in or withdrew from multiemployer plans. *Gray*, 467 U.S. at 722. The PBGC noted that ERISA's withdrawal liability rules failed to provide an efficient mechanism for reducing the burden of withdrawal

[9] In May, 1980, the Plan's actuary reported to the joint committee that over the past three years the funding of the Plan was rapidly approaching a violation of ERISA's funding standard regulations. (Plan Ex. 146(b) at 2). In fact, the surplus in the funding standard account had diminished from $1,414,000 in 1977 to $374,000 by 1979. (Plan Ex. 146(b) at 2). The rapid reduction in the surplus was caused by a continual decline in the number of hours for which contributions were made (Plan Ex. 146(b) at 2), and the continual increase in age and length of service of the Plan participants.

imposed on the multiemployer plan and the remaining employers. *Id.*[10]

After 17 months of debate, Congress passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which the President signed into law on September 26, 1980. *See Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2272 (1993) (discussing legislative process leading to MPPAA). In enacting MPPAA, Congress specifically found that multiemployer pension plans directly affect the continued well-being and security of millions of employees, retirees and their dependents, 29 U.S.C. § 1001a(a)(3); that withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, 29 U.S.C. § 1001a(a)(4)(A); and that in a declining industry the incidence of employer withdrawals is higher and the adverse effects on the plan

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[10] This Court has previously noted the following testimony:

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liability generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue. Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (Statement of Matthew M. Lind).

Gray, 467 U.S. at 722; *Connolly*, 475 U.S. at 216 (1986).

are exacerbated, 29 U.S.C. § 1001a(a)(4)(B). Congress declared it to be among the policies of MPPAA to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans and to provide a financially self sufficient program for the guarantee of benefits under multiemployer plans. 29 U.S.C. § 1001a(c)(3) and (4). The clear intent and purpose of MPPAA is to protect the plan and its remaining employers. *Laborers Health and Welfare Trust Fund for Northern Cal. v. Advance Lightweight Concrete Co., Inc.*, 484 U.S. 539, 545 (1988).

In an effort to address these concerns and further the declared policies, Congress provided in MPPAA that if an employer withdraws from a multiemployer plan, then the employer is liable to the plan in the amount determined to be its withdrawal liability. 29 U.S.C. § 1381(a). Withdrawal liability is the amount determined in accordance with section 1391 of MPPAA to be the withdrawing employer's share of the plan's unfunded vested benefits (with certain adjustments when applicable). 29 U.S.C. § 1381(b). When an employer withdraws from a multiemployer plan, the plan sponsor is to determine the amount of the employer's withdrawal liability, notify the employer of the amount and collect it from the employer. 29 U.S.C. § 1382.

An employer completely withdraws from a plan on the date it permanently ceases to have an obligation to contribute under the plan and applicable labor-management relations laws, or permanently ceases all covered operations under a plan. 29 U.S.C. §§ 1383(a) and 1382(e). MPPAA instructs the plan how to calculate the amount and number of annual payments a withdrawing employer is required to make. 29 U.S.C. § 1399. "In essence, the withdrawal liability imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's

share of contributions to the plan during the years of its participation." *Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2273.

3. 1981 EVENTS INVOLVING SCHLITZ AND THE PLAN

On January 21, 1981, Schlitz notified Miller, Pabst and Local 9 that it had withdrawn from the Association and would bargain separately with Local 9. (Statement of Facts at ¶ 29; P.A. at E-7). On March 9, 1981, Schlitz notified Local 9 that it desired to terminate or modify the existing agreement between the parties. (Statement of Facts at ¶ 32; P.A. at E-7). The collective bargaining agreement expired on May 31, 1981. (Statement of Facts at ¶ 36, P.A. at E-8). Local 9 went on strike against Schlitz on June 1, 1981. (Statement of Facts at ¶ 37; P.A. at E-8).[11] On July 31, 1981, Schlitz announced it was permanently closing its Milwaukee plant and on August 14, 1981, the Schlitz representative resigned from the Plan's joint committee (Statement of Facts at ¶ 38, 39; P.A. at E-8; J.A. at 151-52).

4. PLAN'S CALCULATION OF SCHLITZ' WITHDRAWAL LIABILITY

On August 17, 1981, the joint committee directed the Plan's actuary to calculate Schlitz' withdrawal liability. (Statement of Facts at ¶ 51; P.A. at E-9). When an employer withdraws, MPPAA requires the plan's actuary to determine the present value of the plan's liability for vested

[11] Prior to May 31, 1981, Miller and Pabst reached a new collective bargaining agreement with Local 9. (Statement of Facts at ¶ 48; P.A. at E-9). Schlitz is the first and only employer to withdraw from this Plan since MPPAA was enacted.

benefits. *See Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2273. Section 4201 provides several alternate methods to determine the amount of unfunded vested benefits allocable to a withdrawing employer. 29 U.S.C. § 1391. Under each of these methods the withdrawing employer is allocated a portion of the present value of the plan's unfunded vested benefits and assets as of the last day of the plan year prior to the year in which the withdrawal occurs. Here, the joint committee instructed the Plan's actuary to calculate Schlitz' liability under the method provided in section 4201(c)(4)(D)(i). (Statement of Facts at ¶ 51; P.A. at E-9; Schlitz Ex. 46). This method is described as the direct attribution method because it allocates to a withdrawing employer the portion of unfunded vested benefits directly attributed to the participant's service to that employer.

Schlitz withdrew from the plan in 1981. Using the direct attribution method, the Plan's actuary determined that the value of the Plan's total vested benefits as of December 31, 1980 was $162,241,897. (Schlitz Ex. 92). The Plan's actuary further determined that the Plan had total assets as of December 31, 1980 of $51,226,568. (Schlitz Ex. 92). Thus, as of December 31, 1980, the Plan had unfunded vested benefits in the amount of $111,015,329. (Schlitz Ex. 92). The Plan's actuary calculated that under the direct attribution method 36.96% of these unfunded vested benefits was attributable to Schlitz. Thus, the Plan's actuary calculated that Schlitz' allocable share of unfunded vested benefits as of December 31, 1980 was $41,031,406 (Schlitz Ex. 92).[12]

[12] Section 4201(b) defines an employer's withdrawal liability as the amount determined under section 1391 to be allocable to that employer adjusted by certain amounts, if applicable. 29 U.S.C. § 1381(b). In this case, none of the adjustments required by section 4201 applied to the amount of unfunded benefits allocable to Schlitz. Thus, Schlitz' withdrawal liability, as defined in section

(continued...)

However, under MPPAA, Schlitz was not required to pay the Plan the entire amount of its allocable unfunded vested benefits in a lump sum. Instead, in section 4219(c), Congress provided a detailed method for determining the number and amount of annual payments a withdrawing employer is required to make. As the first step in establishing a payment schedule, section 4219(c) requires a plan to determine the amount of each annual payment based upon the average of the employer's three consecutive highest contribution rates during the ten years ending before the plan year in which withdrawal occurs. 29 U.S.C. § 1399(c)(1)(C). Based upon the instructions in section 4219(c), the Plan's actuary calculated Schlitz' annual payment as $3,945,481. (Transcript of Proceedings before Arbitrator, Volume V at 689).

In section 4219(c)(1)(A)(i), Congress further dictates that an employer shall pay the amount determined under section 1391 adjusted in accordance first with section 1389 and then section 1386[13] over the period of years necessary to amortize the amount in level annual payments calculated **as if** the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and **as if** subsequent payments are made on the first day of each subsequent plan year. 29 U.S.C. § 1399(c)(1)(A)(i). The determination of the amortization period must be based on the same assumptions used for the

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[12] (...continued)
4201(b) and as originally calculated by the Plan's actuary, was $41,031,406.

[13] Section 1389 provides for a reduction in the amount calculated under § 1391 when the amount is *de minimis*. Section 1386 provides for a reduction in the amount calculated under § 1391 when a partial withdrawal has occurred. Schlitz was not entitled to a reduction under either section.

most recent actuarial valuation for the plan. 29 U.S.C. § 1399(c)(1)(A)(ii). Thus, to determine the number of annual payments, Congress instructs the plan's actuary to construct a hypothetical or presumed payment schedule with the first payment made one year after the date used to determine the amount of unfunded vested benefits.

As section 4219(c)(1)(A)(ii) instructs, in calculating the amortization period, the Plan's actuary used a 7% interest rate based upon the assumptions used in the most recent actuarial valuation.[14] In order to determine the period of years necessary to amortize the amount of unfunded vested benefits allocable to Schlitz, the Plan's actuary assessed interest at 7% from December 31, 1980, the date MPPAA instructs the actuary to use to initially determine the amount of the Plan's unfunded vested benefits allocated to Schlitz. The Plan's actuary determined that, at a 7% interest rate, in order to amortize fully the $41,031,406 in unfunded vested benefits allocable to Schlitz, annual payments would have extended to the year 2001.

On September 29, 1981, the joint committee sent a letter to Schlitz demanding payment of $41,031,406. (Statement of Fact at ¶ 53; P.A. at E-9). Section 4219(c)(3) permits each annual payment to be made in four equal installments due quarterly. 29 U.S.C. § 1399(c)(3). MPPAA does not authorize the Plan to charge additional interest to reflect the fact that the annual payment is not actually paid in full on the first day of the plan year. However, if the quarterly payments are not made when due, interest accrues on the late payments from the due date to the payment date. 29 U.S.C. § 1399(c)(3). The withdrawing employer is required to begin

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[14] Although Schlitz initially objected to the use of this interest rate, that objection was abandoned following the arbitration proceedings in this case.

payment not later than 60 days after the date of the demand, notwithstanding any request for review or appeal. 29 U.S.C. § 1399(c)(2). Thus, Schlitz' first quarterly payment was due on November 1, 1981. In accordance with section 4221(d), Schlitz began making the quarterly payments while contesting the amount of its liability. 29 U.S.C. § 1401(d).

5. REVIEW OF THE PLAN'S CALCULATIONS

A. ARBITRATION

After initially requesting additional information from the Plan and notifying the Plan that it disputed the amount of its withdrawal liability, on March 19, 1981, pursuant to section 4221(a)(1), Schlitz requested arbitration of the dispute. 29 U.S.C. § 1401(a)(1). The parties submitted numerous issues to the arbitrator. After hearing testimony and entertaining arguments the arbitrator, among other things, concluded that Schlitz' withdrawal liability should have been calculated under the presumptive method found in section 4211(b), 29 U.S.C. § 1391(b), rather than the direct attribution method utilized by the Plan. (P.A. at E-28). Like the direct attribution method, the presumptive method requires the Plan to use the amount of the unfunded vested benefits as of December 31, 1980, the end of the Plan year preceding Schlitz' withdrawal, to determine Schlitz' allocable share of those unfunded vested benefits. 29 U.S.C. § 1391(b). But the arbitrator also concluded that MPPAA did not provide for interest on the amount for the period from the date used to calculate Schlitz' allocable share of unfunded benefits to the date which, for purposes of establishing a payment schedule, the first payment is presumably made. (P.A. at E-40).

Although the Plan did not agree with and continues to seek review of the arbitrator's rulings, the parties did agree that, based upon those rulings, Schlitz' withdrawal liability was reduced from $41,031,406 to $23,300,000. The amount of Schlitz' annual payment calculated under section 4219(c)(1)(C) remained unchanged and, therefore, the quarterly payments continued to be $986,370. However, based upon the arbitrator's Award, the number of quarterly payments was reduced from 78 to 29. (P.A. at F-5). By the time the arbitrator issued his Final Award on August 24, 1988, only the final quarterly payment remained to be paid pursuant to his Final Award. It was due on November 1, 1988, in the amount of $880,331. Schlitz made this payment.

B. DISTRICT COURT

Schlitz filed a complaint in the District Court seeking confirmation of the arbitrator's Final Award as permitted by section 4221(b)(2). 29 U.S.C. § 1401(b)(2). The Plan filed a counterclaim seeking to vacate and modify the arbitrator's Final Award. On June 6, 1991, the District Court confirmed the arbitrator's Final Award on all issues except for the exclusion of interest on the amount of the unfunded vested benefits allocated to Schlitz for the period from December 31, 1980 to January 1, 1982. The District Court held that by directing the employer to make sufficient payments to amortize in level annual payments the amount of its allocable unfunded vested benefits, MPPAA requires the withdrawing employer to pay interest on the amount from the date used to calculate that amount (J.A. at 62-69).

The District Court entered judgment confirming in part and vacating in part the arbitrator's Final Award. The Plan filed a timely Motion under Rule 59(e) of the Federal Rules of Civil Procedure asking the District Court to quantify the

amount of Schlitz' additional liability to the Plan and to award pre-judgment interest. On June 3, 1992, the District Court ordered that the Plan was entitled to pre-judgment interest and directed the parties to confer in an effort to quantify the amount of Schlitz' additional liability according to the court's rulings. (P.A. at C-1).

The parties could not agree on all elements of the calculation. Finally, on October 20, 1992, the District Court found that Schlitz should have been assessed with an additional $1,631,000 which represented interest on the $23,300,000 in unfunded vested benefits allocated to Schlitz, calculated at 7% for the period between December 31, 1980 and January 1, 1982. (P.A. at D-2). The District Court further found that had the arbitrator not erroneously excluded interest for that period, Schlitz would have been required to make additional payments of $106,039 on November 1, 1988; $986,370 on February 1, 1989; $986,370 on May 1, 1989; and $540,262 on August 1, 1989. (P.A. at D-4). While continuing to contest the decision, the parties agreed that under the arbitrator's Award, as modified by the District Court, Schlitz would have been required to make these additional payments. (P.A. at D-2). The District Court then determined that the Plan was entitled to pre-judgment interest at the prime rate calculated from the dates on which Schlitz should have made the additional payments until June 6, 1991, when the District Court entered its judgment. (P.A. at D-4, D-5). This increased Schlitz' liability to $3,221,371 as of June 6, 1991. The District Court awarded post-judgment interest pursuant to

28 U.S.C. § 1961 from June 6, 1991 until the date Schlitz satisfied its additional liability. (P.A. at D-5, D-8).[15]

C. SEVENTH CIRCUIT

The Plan filed a timely Notice of Appeal from the District Court's judgment and orders. Schlitz filed a Notice of Cross-Appeal. The Plan asked the Seventh Circuit to reverse the District Court's judgment as it related to the Plan's use of the direct attribution rather than the presumptive method for calculating Schlitz' liability. In its appeal, Schlitz asked the Seventh Circuit to reverse the District Court's decision relating to the additional interest or, in the alternative, to vacate the District Court's award of pre-judgment interest. The Seventh Circuit affirmed the District Court on the issue of the method utilized for calculating the amount of unfunded vested benefits allocable to Schlitz and reversed the District Court on the issue of interest assessed on this amount before the first payment was presumed to be made. (P.A. at A-15-18).[16] The Seventh Circuit held that MPPAA did not authorize the Plan to

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[15] In accordance with § 4221(d) of MPPAA, and based upon the District Court's orders, Schlitz paid the Plan $3,424,150, the amount of Schlitz' additional liability plus pre-judgment and post-judgment interest as awarded by the District Court.

[16] The Plan argued that when Schlitz reserved for itself the right to select from among the various methods Congress authorized for calculating the amount of unfunded vested benefits allocable to a withdrawing employer, Schlitz was engaged in a fiduciary function and, therefore, required to select the method which was in the best interest of the Plan rather than the method which was in the best interest of Schlitz. The Seventh Circuit rejected this argument. Because some of this Court's observations in *Concrete Pipe & Prods. Inc.*, 113 S.Ct. at 2264, support the Plan's argument, the Plan also asked this Court to review that portion of the Seventh Circuit's opinion. However, this Court granted the Petition for Writ of Certiorari limited to Question 1.

include interest for the full year between the dates used to calculate the amount of unfunded vested benefits allocable to Schlitz and the date when, for purpose of determining the payment schedule, the first payment is presumed to be made. (P.A. at A-18). It left open the possibility that MPPAA might permit the Plan to include interest for some portion of that year-long period. The Seventh Circuit instructed the District Court to vacate its judgment and enter a judgment enforcing the arbitrator's Final Award in its entirety. (P.A. at A-18). Following the Seventh Circuit's decision, the Plan returned to Schlitz $3,587,936.46, the amount of Schlitz' overpayment according to the Seventh Circuit's opinion plus interest as required by section 4221(d) of MPPAA. 29 U.S.C. § 1401(d).

SUMMARY OF ARGUMENT

In section 4219(c)(1)(A)(i), Congress instructed the Plan to construct a presumed payment schedule in order to determine the number of payments Schlitz was required to make. The issue in this case turns on whether Congress intended for the first payment in the presumed payment schedule to be devoted entirely to reduce the amount of unfunded vested benefits allocated to Schlitz or whether a portion of that payment should be attributed to interest on that amount calculated from the date used to determine the amount of vested benefits allocated to Schlitz. Congress directs a withdrawing employer to make level annual payments sufficient to **amortize** the amount of its allocable share of the Plan's unfunded vested benefits calculated **as if** the first payment is made on the first day of the plan year following the withdrawal. 29 U.S.C. § 1399(c)(1)(A)(i).

As in any case involving a dispute over the meaning of a statute, the starting place is the text of the statute itself. There is no dispute that, at least with respect to every payment in the presumed payment schedule after the first payment, a portion of the payment is devoted to interest accrued on the amount allocated to Schlitz. Congress did not expressly exclude an interest component from the first payment in the presumed payment schedule. Instead, Congress required sufficient annual payments to "amortize" the amount. Because Congress did not direct that the first payment in the presumed payment schedule be treated any differently from the other payments, amortization of the amount requires the first payment in the presumed schedule to include interest.

To the extent there is any perceived ambiguity in the text of this section, the purpose, language and design of MPPAA and ERISA as a whole dictate that the ambiguity be resolved in favor of protecting the Plan, its participants and beneficiaries. Moreover, to interpret the section as urged by Schlitz violates a cardinal rule of statutory construction because it would render meaningless language used by Congress. Finally, the legislative histories of MPPAA and ERISA in general, and of section 4219(c)(1)(A)(i) in particular, confirms that Congress intended to require a withdrawing employer to pay interest on the amount of unfunded vested benefits allocated to the employer from the date used to calculate the amount of benefits to the date the full amount is paid.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 4219(c)(1)(A)(i) REQUIRES SCHLITZ TO MAKE ADDITIONAL PAYMENTS IN ORDER TO AMORTIZE FULLY THE AMOUNT OF UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ.

The Plan asserts that section 4219(c)(1)(A)(i) of ERISA required Schlitz to make additional quarterly payments to

the Plan totaling $2,619,041.[17] Schlitz argues that this provision does not require it to make any additional payments. As this Court has stated repeatedly, when the dispute involves the application or interpretation of a statute, the Court's analysis begins with the text of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992); *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992). When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning in all but the most extraordinary circumstances is complete. *Id.* Section 4219 (c)(1)(A)(i) provides:

> Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

29 U.S.C. § 1399(c)(1)(A)(i).

In this section, Congress unambiguously provided the method for determining the number of payments a withdrawing employer is required to make to the plan. Congress

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[17] There is no dispute that when the presumptive method and the actuarial assumptions accepted by the arbitrator are used, the amount of the Plan's unfunded vested benefits as of December 31, 1980 allocable to Schlitz was $23,300,000. There is also no dispute that Schlitz' annual payment pursuant to section 4219(c) was correctly calculated as $3,945,481.

instructed withdrawing employers to make payments over the number of years necessary to amortize the amount of the plan's unfunded vested benefits allocated to it in level annual payments. Significantly, Congress specifically directed that the period of years over which payments are required shall be "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year." 29 U.S.C. § 1399(c)(1)(A)(i). Immediately following that instruction, Congress noted that actual payments would commence in accordance with paragraph (2), which requires that the first payment be made no later than 60 days after the date of demand. 29 U.S.C. § 1399(c)(2).

The plain language of the section demonstrates that Congress intended that the calculation of the period of years necessary to amortize the amount be based on a presumed payment schedule that did not depend upon when payments were actually due or made. Congress could not have been more explicit. Based upon the direction in section 4219(c)(1)(A)(i), the presumed payment schedule is used to calculate the period over which Schlitz was required to make payments to the Plan. Moreover, Congress provided for interest to be included in such payments at the same rate utilized by the Plan in its most recent actuarial valuation, in this case 7%. 29 U.S.C. § 1399(c)(1)(A)(ii). Under the presumed schedule, Schlitz' first payment is presumed made on January 1, 1982.

Schlitz has not argued that none of the payments in the presumed schedule should be attributable in part to accrued interest. Rather, the dispute in this case is whether the first payment in the presumed schedule is solely used to reduce the amount of unfunded vested benefits allocated to

Schlitz or whether it constitutes a payment partially attributable to such amount and partially attributable to interest on that amount. As the District Court correctly concluded, the plain meaning of the term "amortize" resolves the remaining dispute. (J.A. at 67).

Congress did not define "amortize" in ERISA or MPPAA. When Congress does not specifically define a term, the Court normally construes it in accordance with its ordinary or natural meaning. *Smith v. United States*, 113 S.Ct. 2050, 2054 (1993); *Perrin v. United States*, 444 U.S. 37, 42 (1979). To the extent "amortize" is considered a technical word or a term of art, then the word is construed by reference to the art or science involved. *Brennan v. Corning Glass Works*, 417 U.S. 188, 201 (1974). In this case, the ordinary or natural meaning of "amortize" has become the one derived from its use as an accounting or actuarial term of art.[18]

Indeed, each of the following definitions recognizes that all payments in an amortization schedule include accrued interest. Webster's Dictionary defines "amortize" as follows:

> 1) Law: to alienate in mortmain <amortized the estate>. . . 2) Accounting - a: To provide for the gradual extinguishment of (an obligation, as a mortgage or bond issue) by payment of a part of the principal or by contribution to a sinking fund usually with or at the time of each periodic interest payment.

Webster's Third New International Dictionary Unabridged 72 (1981). Black's Law Dictionary defines "amortization" as follows:

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[18] When attempting to determine the ordinary or natural meaning of terms used in a statute, this Court has previously looked to definitions contained in widely used dictionaries. *Smith*, 113 S.Ct. at 2054.

> The allocation (and charge to expense) of the cost or other basis of an intangible asset over its estimated useful life. Intangible assets which have an indefinite life (e.g., goodwill) are not amortizable. Examples of amortizable intangibles include patents, copyrights and leasehold interests. A reduction in a debt or fund by periodic payments covering interest and part of principal, distinguished from: (1) depreciation, which is an allocation of the original cost of an asset computed from physical wear and tear as well as the passage of time, and (2) depletion, which is a reduction in the book value of a resource (such as minerals) resulting from conversion into a salable product. The operation of paying off bonds, stock, a mortgage, or other indebtedness, commonly of a state or corporation, by installments, or by a sinking fund. An "amortization plan" for the payment of an indebtedness is one where there are partial payments of the principal, and accrued interest, at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished.

Black's Law Dictionary 76 (5th Ed. 1979).

"If a loan is being repaid by the amortization method, each payment is partially repayment of principal and partially payment of interest." S. Kellison, *The Theory of Interest*, (2d Ed. 1991) at 169. In this case, Thomas D. Levy, a consulting actuary from Martin Segal Company, testified that "customary actuarial practice is to reflect interest for periods of time from the date of an obligation or an actuarial present value is determined to the date that it is funded." (Transcript of Proceedings Before Arbitrator, Volume VI at 789-90). Mr. Levy testified that an actuary following the instructions in MPPAA would include interest on the amount in all payments, including the first payment.

(Transcript of Proceedings Before Arbitrator, Volume VI at 791). Courts that have interpreted the term "amortize" have also repeatedly noted that the term calls for a payment of an indebtedness where there are partial payments of principal and accrued interest at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished. *Hamilton v. BS & W*, 870 S.W.2d 436, 438 (Ky. Ct. App. 1993); *Hwa Young Yu v. Stephens*, 591 So.2d 858, 859 (Ala. 1991); *Bystra v. Federal Land Bank*, 90 S. 478 (Fla. 1921); *Brooke v. Phillips Petroleum Co.*, 149 S.E.2d 511, 514 (Ga. Ct. App. 1966).

Based upon the ordinary and natural meaning, as well as the accounting or actuarial meaning of the term "amortize," all payments, including the first payment in the presumed payment schedule must be attributable in part to the amount of the allocated share of unfunded vested benefits and in part to interest accrued on the amount. *Huber*, 916 F.2d at 997. Following Congress' instructions in section 4219(c)(A)(1)(i), the presumed payment schedule for the amount of Schlitz' allocated share of the Plan's unfunded vested benefits is as follows:

PLAN'S UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ

DATE	AMOUNT	TRANSACTION	BALANCE
12/31/80	23,300,000	Allocated to Schlitz	23,300,000
12/31/81	23,300,000	Accrued interest 7% 1,631,000	24,931,000
01/01/82	24,931,000	Payment (1) from Schlitz 3,945,481	20,985,519
12/31/82	20,985,519	Accrued interest 7% 1,468,986	22,454,505
01/01/83	22,454,505	Payment (2) from Schlitz 3,945,481	18,509,024
12/31/83	18,509,024	Accrued Interest 7% 1,295,632	19,804,656
01/01/84	19,804,656	Payment (3) from Schlitz 3,945,481	15,859,175
12/31/84	15,859,175	Accrued Interest 7% 1,110,142	16,969,317
01/01/85	16,969,317	Payment (4) from Schlitz 3,945,481	13,023,836
12/31/85	13,023,836	Accrued interest 7% 911,669	13,935,504
01/01/86	13,935,504	Payment (5) from Schlitz 3,945,481	9,990,023
12/31/86	9,990,023	Accrued interest 7% 699,302	10,689,324
01/01/87	10,689,324	Payment (6) from Schlitz 3,945,481	6,743,843
12/31/87	6,743,843	Accrued Interest 7% 472,069	7,215,912
01/01/88	7,215,912	Payment (7) from Schlitz 3,945,481	3,270,431
12/31/88	3,270,431	Accrued interest 7% 228,930	3,499,361
01/01/89	3,499,361	Payment (8) from Schlitz 3,499,361	-0-

Thus, following the instructions of section 4219(c)(1)(A)(i), Schlitz should have made seven annual payments of $3,945,481 and one annual payment of $3,499,361. In fact, based upon the arbitrator's decision as affirmed by the Seventh Circuit, Schlitz actually made seven annual payments of $3,945,481 and one payment of $880,331.

Schlitz has observed that section 4219(c)(1)(A)(i) is silent about whether the first presumed payment should include an interest component or should be applied to reduce fully the amount of the unfunded vested benefits allocated to it. The Fourth and Seventh Circuits have relied upon the absence of reference to "interest" in this particular section to conclude that Congress did not intend to include accrued interest in the first payment in the presumed schedule. *Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension*, 974 F.2d 528, 536 (4th Cir. 1992); *Jos. Schlitz Brewing Co.*, 3 F.3d 994, 1004 (7th Cir. 1993). This argument ignores that, construed in accordance with its natural and ordinary meaning, the term "amortize" contemplates a series of regularly scheduled payments and that each payment, including the first, had an interest component. Use of the term "interest" in such context would be redundant. Thus, Congress explicitly included an interest component in the payments and was silent on exempting the first presumed payment in the schedule from accrued interest.

The Seventh Circuit held that nothing in section 4219 (c)(1)(A)(i) permitted the Plan to include as part of the first presumed payment a full year's interest on the amount of unfunded vested benefits allocated to Schlitz. Without citation to any language in the statute, the Seventh Circuit did, however, raise the possibility that Congress authorized attributing a portion of the first presumed payment to interest for some period of time less than the full year, *e.g.*, from the time of withdrawal to the date of the first payment. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1004. But Congress made no distinction between interest in the pre-withdrawal and post-withdrawal period. Thus, contrary to the possibility suggested by the Seventh Circuit, the plain text of section 4219(c)(1)(A)(i) does not permit including a portion of a year's worth of interest in the presumed first payment. Congress was clear. The first and all payments in the presumed schedule must include an interest component.

II. CONSIDERED IN THE CONTEXT OF THE ENTIRE STATUTORY SCHEME, CONGRESS CLEARLY REQUIRED SCHLITZ TO MAKE ADDITIONAL PAYMENTS TO AMORTIZE FULLY THE AMOUNT OF THE PLAN'S UNFUNDED VESTED BENEFITS ALLOCATED TO IT.

To the extent the language used by Congress in section 4219(c)(1)(A)(i) read in isolation leaves any doubt about whether the first payment in the presumed payment schedule must include interest, the Court may look to the design and structure of ERISA and MPPAA to interpret this section in context of the entire statutory scheme. *Estate of Cowart,* 112 S.Ct. at 2595; *Crandon v. United States*, 494 U.S. 152, 158 (1990). A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive result that is compatible with the rest of the law. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). As the Solicitor General noted, when one considers that the amount which must be amortized is the amount of unfunded vested benefits which are allocated to a withdrawing employer, it is clear that Congress intended for interest to accrue on the amount from the date used to determine that amount, the last day of the plan year prior to withdrawal. Brief For The United States As Amicus Curiae at 18.

This Court has recognized that one of the primary purposes of ERISA and MPPAA articulated by Congress is to provide sufficient funding for the vested benefits which participants in pension plans have earned and anticipate receiving. 29 U.S.C. §§ 1001(c); 1001a(C)(3) and (4); *Nachman*, 446 U.S. at 375; *Alessi*, 451 U.S. at 510; *Gray*, 467 U.S. at 721; *Central States Pension Fund*, 472 U.S. at 569; *Connolly*, 475 U.S. at 212; *Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2271. ERISA and MPPAA are structured and designed with that goal in mind. MPPAA in particular was designed not to protect withdrawing employers but instead to protect the plan and those employers which continued to participate in the plan. *Laborers Health and Welfare*, 484 U.S. at 545.[19] Thus, the Court should construe section 4219(c)(1)(A)(i) in accordance with the clear purpose of ERISA and MPPAA—to protect the funding of vested benefits and to minimize the adverse impact of a withdrawal on non-withdrawing employers.

To interpret properly section 4219(c)(1)(A)(i) within the design and structure of ERISA and MPPAA, the Court should observe the concern Congress demonstrated for funding problems when it required plans to establish the funding standards account. 29 U.S.C. § 1082. Congress carefully and precisely dictated what amounts could be credited to the account and what amounts had to be charged to the account. 29 U.S.C. §§ 1082 (b)(2) and (3). The entire purpose of this detailed exercise is to attempt to ensure that the present cash value of contributions on an annual basis will be sufficient to cover the present cash

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[19] Although not one of the purposes of MPPAA, withdrawing employers are protected to a certain extent because they are not charged with the funding of benefits earned or greater underfunding problems created or arising after the end of the plan year prior to the year in which they withdraw.

value of the plan's liabilities. In fact, Congress does not allow a plan to credit its funding standards account for payments from withdrawn employers if the payment reflects advance funding for plan liabilities. 29 U.S.C. § 1082(b)(7)(A). After demonstrating such care in matching unfunded vested benefits and other costs to annual contributions in section 1082 of ERISA, Congress certainly would not have deliberately left a gap in funding of the portion of unfunded vested benefits that is allocated to a withdrawing employer.

Schlitz has argued that it is not fair to impose any interest on the unfunded benefits for the period between December 31, 1980 and January 1, 1982 because in 1981, prior to its withdrawal, Schlitz continued to make contributions to the Plan. Endorsing this argument, the Seventh Circuit suggested that Congress did not necessarily leave a gap in funding because during the year of withdrawal, an employer makes contributions to the plan. In some cases, those contributions actually may reduce the amount of a plan's unfunded vested benefits between the end of the prior plan year and the date of withdrawal. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1004. The Seventh Circuit acknowledged that in other cases the plan's underfunding could actually increase before the withdrawal. *Id.* Typically, current contributions in an ongoing plan are first used to pay the plan's current costs, then to pay the interest on unfunded liabilities and finally, to reduce the amount of unfunded liabilities. It is, therefore, most likely that in plans experiencing funding problems, the regular contributions by employers will not reduce funding deficiencies during that portion of the year prior to withdrawal.

According to the Seventh Circuit, "the law of large numbers" eventually evens these things out for the plan but not for the withdrawing employer. To the extent the "law of

large numbers" imposes a greater liability on the remaining employers or creates a greater potential for underfunding, it is inconsistent with the allocation of risk intended by Congress and the clear intent and purpose of MPPAA articulated by Congress—protecting the plan and its remaining employers. *Laborers Health and Welfare Trust Fund*, 484 U.S. at 545. Congress intended that the withdrawing employer be fully responsible for its allocated share of the unfunded benefits. Accordingly, the Seventh Circuit's perfunctory analysis should be rejected.

Rather than focusing on the potential adverse impact on the Plan or remaining employers and beneficiaries, the Seventh Circuit focused on the perceived fairness to Schlitz. The Seventh Circuit based its holding in part on its observation that Schlitz was not liable for one penny until it withdrew from the Plan and received a notice of liability. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1004. This observation completely ignores the structure and design of ERISA and MPPAA as well as the nature of Schlitz' obligations. Until it withdrew from the Plan, Schlitz was required to make regular monthly contributions to the fund created by the Plan. The amount of these contributions was established according to the Plan by both the collective bargaining agreement and ERISA funding requirements. When Schlitz' obligation to make contributions to the Plan ceased under the terms of the Plan, the collective bargaining agreement and applicable labor-management relations laws, MPPAA began to dictate the amount, frequency and duration of Schlitz' required contributions to the Plan.

An employer's liability for these unfunded vested benefits arises out of the employer's pre-existing obligations and does not magically appear on the date the employer withdraws. *Huber*, 916 F.2d at 95. MPPAA merely dictates a new schedule of payments for the liability and limits the

withdrawing employer's future payments to only those required to amortize its allocated share of the unfunded vested benefits as of a date certain. This Court has noted: "MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal." *Gray*, 467 U.S. at 734.

It is also important to keep in mind that withdrawal liability represents the present cash value of the employer's share of the unfunded vested benefits as of a certain date. *Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2264. In other words, it is an amount necessary to provide sufficient funds to pay at some time in the future the vested benefits, as if that amount were deposited in an account earning interest on that day. Congress does not require plans to calculate the present value of the unfunded benefits allocated to a withdrawing employer as of the date of withdrawal. Instead, it instructs plans to determine the present cash value as of the last day of the plan year preceding withdrawal.[20] Obviously, until an employer actually makes payments, the plan cannot start to earn interest on the funds.

If an employer withdraws early in a plan year and the plan makes the calculation and demand quickly, the payments may start in the first quarter of the plan year of withdrawal. Under such circumstances, based upon the Plan's reading of section 4219(c)(1)(A)(i), a plan might actually recover more than necessary to fully fund the amount of unfunded vested benefits allocated to an employer because the actual payment is made before the date of the presumed first payment. On the other hand, if the

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[20] Regardless of whether a withdrawal occurs, the plan must calculate the plan's liabilities at least once a year. 29 U.S.C. § 1082(c)(9).

employer withdraws near the end of a plan year or it takes some time for the plan to complete its calculations, the actual first payment may not occur until well into the plan year following the year in which the withdrawal occurs. Under those circumstances, even under the Plan's reading, a plan would not recover the full amount necessary to fund the unfunded vested benefits allocated to that employer because the actual payment would be received after the presumed first payment.

Moreover, if, as the Fourth and Seventh Circuits have held, a plan is not allowed to include accrued interest from the date used to calculate the amount of the unfunded vested benefits allocable to an employer until the date of the presumed first payment, the gap between the liability and the funding is even larger. If there is a gap, it must either be eliminated by the remaining employers or be directly absorbed by the plan's participants and beneficiaries in the form of lost benefits. While the potential exists for a gap in funding, if an employer withdraws late in a plan year, Congress did not intend to expand that potential gap by excluding accrued interest from the first payment in the presumed schedule.

Finally, in addition to administrative convenience, by providing a uniform rule which does not depend upon the date of withdrawal or the date of actual first payment for determining the number of payments necessary, Congress reduced the potential for abuse by either withdrawing employers or the plan, and established a risk allocation which is consistent with the goals of the legislation enacted. If interest ran only from date of withdrawal to the presumed first payment date, an employer could accelerate or postpone withdrawal depending upon whether the amount of its regular contribution was more or less than the amount of interest which would apply. If interest accrued

between the date of withdrawal and the date of actual first payment, a plan could delay making its demand, thereby increasing the amount of interest imposed on the withdrawing employer. Congress eliminated the potential for these tactics. Regardless of when the withdrawal or actual first payment occurs, interest is included in the first payment in the presumed schedule. When correctly considered in the context of the design and the scheme of ERISA and MPPAA, it is clear that Congress intended to ensure that a withdrawing employer fully fund the amount of unfunded vested benefits allocated to it and, thus, intended to include interest for the period from the date used to calculate the employer's allocable share of the unfunded vested benefits until the date that amount was fully funded.

III. THE READING OF SECTION 4219(c)(1)(A)(i) URGED BY SCHLITZ VIOLATES A CARDINAL RULE OF STATUTORY CONSTRUCTION.

It is an elementary rule of statutory construction that a court should give effect, if possible, to every clause and word of a statute. *Moskal v. United States,* 498 U.S. 103, 108 (1990); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985). In *Huber*, the court relied upon this rule to conclude that Congress intended to include interest on the amount from the last day of the plan year prior to withdrawal until the first day of the plan year following the withdrawal. 916 F.2d at 97.

Congress provided that the period of years necessary to amortize the amount in level annual payments be "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year." 29 U.S.C. § 1399(c)(1)(A)(i). The court in *Huber* explained that

this method of calculation is similar to an immediate annuity rather than an annuity due. 916 F.2d at 98. The court in *Huber* explained that the first payment of an annuity due is made at the beginning of the interval and, therefore, is applied entirely to principal. On the other hand, the first payment of an immediate annuity is made at the end of the payment interval and, therefore, includes interest for that interval. 916 F.2d at 98. Congress' use of the immediate annuity concept is consistent with the natural and ordinary meaning of the term "amortize" as used in this section of the statute. *See* Argument Section I *infra*.

Moreover, the court in *Huber* concluded that the clause used by Congress would have no significance unless it was construed to require that interest for the first interval be included in the first payment in the presumed payment schedule. The court noted that if Congress had not intended to include interest in the first payment, it could have simply provided that the presumed payment schedule should be calculated as if payments were made annually. *Huber*, 916 F.2d at 97. The presumed payment schedule would then show the first payment to be made 60 days after demand and the second payment made on the same day one year later. Congress also could have provided that the first payment be presumed made on the first day of the plan year in which the withdrawal occurs, the day after the date used for calculating the amount. Congress did not use six words to direct the calculation to be made "as if payments were made annually." Instead, Congress used 42 words to describe carefully how the calculation should be made and designated the presumed first payment a year and a day after the date used to fix the amount allocated to the employer. This Court has often stated that "courts must presume that a legislature says in a statute what it means

and means in a statute what it says there." *Connecticut Nat'l Bank*, 112 S.Ct. at 1149.[21]

IV. THE LEGISLATIVE HISTORIES OF ERISA AND MPPAA IN GENERAL AND SECTION 4219(c)(1)(A)(i) IN PARTICULAR CONFIRM THAT INTEREST ON THE AMOUNT OF UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ ACCRUES FROM THE DATE USED TO DETERMINE THE AMOUNT.

There is a wide range of opinion about the usefulness of legislative history materials in attempting to glean the

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[21] Schlitz has erroneously attempted to rely on another rule of statutory construction in support of its interpretation of the MPPAA section at issue. This Court has recognized that, provided the interpretation of an administrative agency is not contrary to the express intent of Congress, courts will accord deference to a reasonable statutory interpretation by an administering agency. *Estate of Cowart*, 112 S.Ct. at 2594. In the *Huber* case, the PBGC submitted an amicus brief arguing that the intent of Congress on this issue is not clear but that because Congress was not explicit, it must not have intended for inclusion of interest for the period at issue. 916 F.2d at 96. Because the court found the PBGC's position inconsistent with the intent of Congress, the court in *Huber* rejected it. 916 F.2d at 97. In the Seventh Circuit, Schlitz cited the PBGC's position in *Huber* as support for its argument. To date, the PBGC has not taken any position in this case. In fact, since its position was rejected in *Huber* it has not taken any litigation position on this issue or issued any regulations relating to this issue. The Seventh Circuit refused to give any deference to the PBGC's litigation position in *Huber* which was not supported by regulations, rulings or administrative practice. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1003. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (deference to agency's litigating position is inappropriate). The Seventh Circuit noted that, in light of the PBGC's silence following *Huber*, it cannot be sure whether the PBGC continues to maintain the interpretation set forth in *Huber*. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1003. For the reasons articulated in *Huber* and by the Seventh Circuit, this Court should not accord any deference to the litigation position of the PBGC expressed in *Huber*.

intent of Congress. Although the Plan believes that it is not necessary to resort to such sources in order to derive Congress' intent in this case, as this Court has observed, inquiry benefits from reviewing all available information rather than ignoring it. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 2485, n.4 (1991). In this case, the legislative history confirms that Congress intended the result urged by the Plan.

Throughout this Brief the Plan has noted the findings and purpose of ERISA and MPPAA as well as the legislative history relating to those statutes. This Court has repeatedly and consistently recognized that the legislative history of ERISA and MPPAA makes it clear Congress intended to protect plan participants and beneficiaries and to avoid imposing additional burdens on employers which remained in the multiemployer plan. This legislative history is consistent with the Plan's reading of section 4219(c)(1)(A)(i).[22]

A review of the changes from the Senate Bill and the House Bill to the enacted version of this section reveals Congress considered, but rejected, limiting interest to the period after withdrawal. Senate Bill 1076 introduced April 9, 1979 fixed withdrawal liability as of the last day of

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[22] The court in *Huber* noted that an example of how withdrawal liability is calculated, including the number of necessary payment periods, is contained in several committee reports. 916 F.2d at 98 n.30. The results achieved in the example can only be recreated if interest for a full year is applied to the first presumed payment. The court in *Huber* concluded that, because of the complexity of the calculations necessary to realize that interest was included in the first period and the lack of any direct testimony about how the example was prepared, it is unlikely that the example is a good indication of congressional intent on this issue. 916 F.2d at 98 n.30. The example, however, is consistent with the plain meaning of the term "amortize."

the plan year ending prior to withdrawal. Section 4201(e)(5) of that Senate Bill provided that interest shall be charged from the date of the withdrawal. S. 1017, 96th Cong., 1st Sess. (April 9, 1979). Senate Bill 1076, therefore, clearly would have limited the application of interest to the period after the date of withdrawal.

In contrast, the parallel House Bill that became MPPAA, H.R. 3904, utilized the last day of the plan year in which withdrawal occurs to calculate the amount of unfunded vested benefits allocated to a withdrawing employer, and provided that the amortization schedule be calculated as if the first payment were made on the first day of the plan year following withdrawal. Report of the House Committee on Education and Labor, H.R. Rep. No. 96-869 pt. 2, at 15 (1980). Thus, the House Bill contemplated essentially no lapse of time between the date used to determine the amount and the date of the first presumed payment. The House Bill did not need to address interest for any gap period.

The version of MPPAA enacted appears to be a hybrid of the Senate and House Bills. The combination of the House and Senate Bills is consistent with the stated policy of MPPAA because it provides the greatest protection to the plan and its beneficiaries. The enacted version adopts the administratively convenient Senate concept of making the calculation based upon the amount of the unfunded benefits as of the last day of the plan year prior to withdrawal. It also adopts the House Bill's protection of full funding of the amount by eliminating the limitation on interest found in the Senate's Bill. Although the legislative history does not reveal the reasons for the enacted version or express why the Senate's restriction on interest was eliminated, when Congress deletes limiting language from a draft version of a statute, it may be presumed the limitation was not

intended. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S.Ct. 517, 540 (1993).

CONCLUSION

The withdrawal liability provisions of MPPAA are designed and structured to guarantee that all vested benefits promised to employees in multiemployer pension plans will be paid. Section 4219(c)(1)(A)(i) is one of the provisions designed to ensure full funding of the vested benefits. Congress clearly required a withdrawing employer to make sufficient annual payments to a multiemployer plan to fully fund the amount of unfunded vested benefits allocated to that employer. To achieve this goal, Congress required that all payments, including the first payment in the presumed payment schedule, which is created to determine the period over which payments must be made, be attributed in part to interest accrued on the amount of unfunded benefits allocated to the withdrawing employer.

In this case, the Seventh Circuit ignored the text of section 4219 as well as the statutory scheme of ERISA and MPPAA, and erroneously excused Schlitz from making the number of payments required by Congress. That court, without sufficient analysis of the legislation enacted by Congress, shifted the risk of underfunding for the allocated vested benefits to the Plan participants, beneficiaries and the remaining employers. The Plan respectfully requests that this Court reverse the judgment of the Seventh Circuit and hold that in Section 4219(c)(1)(A)(i) Congress requires a withdrawing employer to make payments which include interest from the date used to determine the amount of the employer's share of the unfunded vested benefits, the last day of the plan year prior to withdrawal, until the date the presumed first payment is made, the first day of the plan year after withdrawal. Further, the Plan requests that the

Court vacate the judgment of the Seventh Circuit on this issue and remand the case to the Seventh Circuit with instructions that it remand the case to the District Court for the purpose of calculating Schlitz' total additional liability as of that date, including pre-judgment and post-judgment interest as previously awarded by the District Court, and entering judgment in favor of the Plan in that amount.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. (1979) 31, 32, 48, 10a
Multiemployer Pension Plan Termination Insurance Program, Hearing before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979) 39, 11a
The Multiemployer Pension Plan Amendments Act of 1979, Hearing before the House Comm. on Ways and Means, 96th Cong., 2d Sess. (1980) 21, 11a
Multiemployer Pension Plan Amendments Act of 1979, Hearings before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979) 11a
Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance, 96th Cong., 2d Sess. (1980) 11a

MISCELLANEOUS

Dan McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pension* 266-70 (6th ed. 1989) 5, 6, 7, 12, 42, 44

Wayne Jett, *The Path to Destruction of Taft-Hartley Pension Trusts: Mandatory "Defined Benefit Plan" Status, reprinted in The Multiemployer Pension Plan Amendments Act of 1979, Hearing before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. (1980) 49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-768

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF FOR RESPONDENTS

Respondents, Jos. Schlitz Brewing Company ("Schlitz") and The Stroh Brewery Company ("Stroh"), respectfully submit this Brief urging the Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit rendered on August 13, 1993.[1]

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[1] In 1982, Schlitz was acquired by Stroh. Schlitz was merged into Stroh, which assumed its liabilities to the Petitioner. Stroh is a corporation and is wholly-owned by The Stroh Companies, Inc. Stroh has no subsidiaries to list pursuant to Rule 29.1.

COUNTER-STATEMENT OF THE CASE

This case arises under the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").[2] In MPPAA, Congress supplemented the task undertaken six years earlier with the passage of the Employee Retirement Income Security Act of 1974 ("ERISA").[3] *See generally Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2271-72 (1993). Together, these legislative enactments help protect the pension promises made by private employers to the nation's workforce. *See* 29 U.S.C. §§ 1001, 1001a.

Before the Court is a narrow issue of statutory interpretation: whether MPPAA authorizes a plan to assess interest against a withdrawing employer for the year in which the withdrawal occurs. In the decision below, the court of appeals disallowed the plan's assessment of interest for the withdrawal year. *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1004 (7th Cir. 1993), Pet. App. A-17 to -18. Writing for a unanimous panel, Judge Easterbrook expressly approved the earlier opinion of the Fourth Circuit in *Borden, Inc. v. Bakery & Confectionary Union & Indus. Int'l Pension*, 974 F.2d 528 (4th Cir. 1992). By contrast, the Third Circuit has held that it is proper for a plan to assess "first year" interest. *Huber v. Casablanca Indus.*, 916 F.2d 85, 100 (3d Cir. 1990), *cert. dismissed*, 113 S. Ct. 1070 (1993).[4]

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[2] Pub. L. No. 96-364, 94 Stat. 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1988)). Unless otherwise noted, all citations herein to the United States Code are to the 1988 codification.

[3] Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)). Citations herein to ERISA are to either sections of the Act or to the parallel sections of 29 U.S.C. Parallel citations for each provision appear in the Table of Authorities.

[4] The Third Circuit's position is not entirely clear. In a later case, that court, without issuing an opinion, affirmed a district court decision that permitted interest to accrue only from the date of withdrawal, rather than during the entire year in which the withdrawal occurred. *See Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund*, 8 F.3d 810 (3d Cir. 1993), *aff'g Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters Fund*, 16 Employee Benefits Cas. (BNA) 2100, 2104 (W.D. Pa. 1993).

In their briefs, Petitioner and *amici* have all provided summaries of the statutory scheme.[5] In our view, however, their treatments are unduly narrow and fail to explain the broader context in which MPPAA's withdrawal liability provisions operate. We begin, therefore, with a discussion of the backdrop against which Congress legislated and a review of certain features of ERISA. We then explain how the statute directs withdrawal liability to be computed and collected, using the facts of this case to illustrate.

A. Defined Benefit Pension Plans

Petitioner, the Milwaukee Brewery Workers' Pension Plan ("the Plan"), is a multiemployer plan as defined by § 3(37) of ERISA, 29 U.S.C. § 1002(37). It was established in 1954 and has been maintained pursuant to a series of collective bargaining agreements between the Brewery Workers Local Union No. 9 and the contributing employers. *See* Pet. App. at E-5. The Plan provides retirement benefits to its participants and their beneficiaries based on formulae specified in the plan document. J.A. 97-112. It is funded by employer contributions and investment earnings thereon. All of the Plan's assets are pooled; there are no separate accounts for individuals, participants or employers.

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[5] *Amicus* briefs on the merits in support of the Petitioner were filed by Central States, Southeast and Southwest Areas Pension Fund ("Central States") and the National Coordinating Committee for Multiemployer Plans ("NCCMP"). Although the United States filed a brief urging the Court to review the issue presented, it did not file a brief on the merits.

Paying benefits at specified levels is typical of "defined benefit" pension plans. In another respect, however, the Plan is similar to a "defined contribution" pension plan—the rate at which each employer must contribute to the Plan is specified in the governing collective bargaining agreement. *See Connolly v. PBGC*, 475 U.S. 211, 232 (1986) (O'Connor, J., concurring) (noting that collectively bargained multiemployer plans "possess the characteristics of both fixed contributions and fixed benefits"). Prior to ERISA, an employer's financial obligation to a multiemployer plan was governed by the collective bargaining agreement, and employers generally had no obligation to contribute anything beyond the amount required by that agreement. *See id.* at 232-33.

ERISA, however, places plans such as this one in the "defined benefit" category. *Compare* 29 U.S.C. § 1002 (34) (an "individual account" or "defined contribution" plan "provides for an individual acount for each participant") *with id.* § 1002(35) (" 'defined benefit plan' means a pension plan other than an individual account plan"). Defined benefit plans, unlike defined contribution plans, are subject to statutory funding rules and to regulation by the Pension Benefit Guaranty Corporation ("PBGC"), as described more fully below.

In a typical defined benefit plan, covered employees earn, or "accrue," their retirement benefits incrementally over a period of years during their active employment. To the extent that an incremental benefit accrues from the current year of service, the plan's liability for that incremental addition is said to be a "normal cost" of the plan. Defined benefit plans often grant credit for years worked prior to the date the plan was established; the liability attributable to such periods is said to be a "past service" or "accrued" liability of the plan. Similarly, plan amendments that increase the level of benefits may impose a "past service" cost if the increased benefits are to be calculated with reference to years of service prior to

adoption of the amendments. *See* Dan McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 266-70 (6th ed. 1989) [hereinafter *McGill & Grubbs*].

The monthly benefit formula under a defined benefit plan is known in advance. But the cost of providing the benefit—the amount of money that will be sufficient to satisfy the future benefit obligations—is uncertain. This is because the cost depends upon a number of future events, such as the ages at which participants will actually retire and begin receiving benefits, the investment return that will be earned on the fund's assets, the rate at which participants will drop out of the plan, and the rate at which participants and their beneficiaries will die. Plan administrators retain pension actuaries to estimate plan costs by applying various assumptions concerning these future events. *See generally Wachtell, Lipton, Rosen & Katz v. Commissioner*, 26 F.3d 291, 293-94 (2d Cir. 1994); *Vinson & Elkins v. Commissioner*, 7 F.3d 1235, 1236 (5th Cir. 1993). This process is called an "actuarial valuation" of the plan. As summarized by the Plan's actuary in this case:

> The valuation technique involves a projection of the future amounts that may be payable to each participant, a determination of the probability that each such payment will have to be made, and a computation of the present value of the probable future payments.

J.A. 181. A plan is "underfunded" whenever the present value of its liability for accrued benefits exceeds the current value of its assets.

Although actuarial assumptions are chosen by trained professionals, *Concrete Pipe*, 113 S. Ct. at 2284, they are nevertheless educated guesses. It follows that the amount computed to be the plan's liability, calculated by applying a particular set of assumptions to available data, is itself an estimate. Perhaps for this reason, "actuarial practice has been described as more in the nature of an

'actuarial art' than a science." *Id.* at 2286 (citation omitted). Since an actuary's principal responsibility is to ensure that funds will be available to satisfy pension obligations as they come due, actuaries tend to take a cautious or "conservative" approach in selecting assumptions, particularly when funding is anticipated to continue for a long period of time. *See Vinson & Elkins v. Commissioner*, 99 T.C. 9, 26-27 (1992), *aff'd*, 7 F.3d 1235 (5th Cir. 1993). In other words, actuaries tend to lean towards overstating the plan's liabilities, rather than understating them.

B. Funding Rules Under ERISA

ERISA and the Internal Revenue Code contain complex rules governing the funding of defined benefit pension plans. 29 U.S.C. § 1082; I.R.C. § 412. These "minimum funding standards" apply to both multiemployer plans and single employer plans, although some of the rules differ depending upon the type of plan. *See McGill & Grubbs* at 381. The minimum funding standards help protect the interests of plan participants in assuring that funds will be available to pay promised benefits.

Under the minimum funding rules, each plan is required to maintain a "funding standard account." I.R.C. § 412(b)(1). Each year, the funding standard account must be charged and credited as specified in the statute. *Id.* § 412(b)(2), (3). The "minimum funding contribution" for each year is, in effect, the amount required to eliminate any debit balance in the account that remains after applying the various charges and credits. *Id.* § 412(a). Normal cost must be funded in the year in which it arises and unfunded past service liability is amortized over specified periods of time. *Id.* § 412(b)(2). Employer contributions to multiemployer plans are made in accordance with the terms of the governing collective bargaining agreement. These plans must nevertheless maintain a

funding standard account and satisfy the minimum funding contribution each year.[6] The contribution levels specified in the collective bargaining agreement are designed to ensure that the plan receives no less than the ERISA-prescribed minimum funding contribution in each year that the agreement remains in effect.

The ultimate goal of pension plan funding is to accumulate during each participant's pre-retirement years sufficient assets to fund an annuity payable for the rest of the participant's life and, where the plan so provides, the life of the participant's spouse. *See Vinson & Elkins*, 99 T.C. at 25. But since "imprecision inheres in the choice of actuarial methods and assumptions," *Concrete Pipe*, 113 S. Ct. at 2286, "[o]nly by coincidence will the actual experience of the plan conform to the assumptions that underlie the actuarial cost estimate." *McGill & Grubbs* at 270. The minimum funding standards take this inevitable mismatch between projection and reality into account by providing several mechanisms for self-correction of plan funding.

ERISA requires annual valuations by "enrolled" actuaries. 29 U.S.C. §§ 1023(a)(4)(A), 1082(c)(9); I.R.C. § 412(c)(9). Each such valuation updates the actuary's estimate of liability by incorporating the plan's actual experience since the last valuation. If the actuarial assumptions turn out to have been too conservative (*i.e.* to have overstated the plan's liabilities) when compared with actual experience, the plan is said to have incurred an "actuarial" or "experience" gain. That gain is then amortized over a number of years by reducing the level of future contributions, as provided in § 412(b)(3)(B)(ii) of the Internal Revenue Code. By the same token, if the assumptions were overly opti-

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[6] The Plan's funding standard account for the 1981 plan year appears at pages 201-203 of the Joint Appendix. It shows that a contribution of at least $8,917,996 was needed to satisfy the minimum funding obligation for the year ending December 31, 1981.

mistic (*i.e.* to have understated liabilities), the plan incurs an "actuarial" or "experience" loss, which is amortized over future years by increasing the level of contributions. *Id.* § 412(b)(2)(B)(iv). If plan experience differs significantly from that assumed over a period of years, the actuary will adjust the assumptions accordingly, and a gain or loss created by a change in assumptions will also be amortized over a period of years. *Id.* § 412 (b)(2)(B)(v), (b)(3)(B)(iii).[7]

C. Title IV of ERISA—Termination Insurance

The withdrawal liability provisions of MPPAA appear in Title IV of ERISA. There Congress created a plan termination insurance program to be administered by the PBGC. 29 U.S.C. § 1302(a); *see generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984).

In general, under the termination insurance program PBGC collects premiums from the sponsors of covered defined benefit plans and provides insurance coverage to those plans upon the happening of an insured event. *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-38 (1990). For single employer plans, the insured event is termination of the plan with insufficient assets to satisfy liabilities. In that event, PBGC pays pension benefits to the plan's participants and beneficiaries up to certain levels. 29 U.S.C. § 1322(a). For multiemployer plans, PBGC is to provide "financial assistance" in the form of loans to insolvent plans. 29 U.S.C. § 1431. PBGC also guarantees certain levels of benefits to participants in insolvent multiemployer plans. 29 U.S.C. § 1322a. PBGC has a claim against the sponsor of an insufficient single employer plan that terminates for the amount of the underfunding. 29 U.S.C. § 1362(b). When a multiemployer plan terminates, liability for all of the plan's

[7] These concepts are illustrated in the Plan's actuarial valuation report for 1981, which appears in the Joint Appendix. *See* J.A. 198-200. *See generally McGill & Grubbs* at 379-85.

underfunding for vested benefits is allocated among the contributing employers. 29 U.S.C. § 1399(c)(1)(D).

The termination insurance provisions of Title IV that are applicable to multiemployer plans were added to the statute in 1980 by MPPAA. As originally drafted in 1974, the statute had the effect of encouraging employers to withdraw from financially troubled multiemployer plans in the hope of avoiding liability for the plan's underfunding. *See generally R.A. Gray & Co.*, 467 U.S. at 720-22. This failing was recognized before mandatory insurance coverage for multiemployer plans became effective, and in 1977 PBGC was instructed by Congress to study the problem and recommend appropriate legislative action. *Id.* at 721. MPPAA emerged in 1980 as the culmination of this study by PBGC and the ensuing legislative process.[8] The statute's legislative history is discussed in greater detail in section II below.

D. Withdrawal Liability Under MPPAA

One of the principal innovations of MPPAA was to make an employer that withdraws from a multiemployer plan liable for a portion of the plan's unfunded vested benefits ("UVB").[9] The statutory scheme discourages

[8] The PBGC, which is responsible for paying benefits to participants in failed plans, has taken the position that MPPAA does *not* authorize the imposition of withdrawal year interest, even though under that interpretation the plan receives less withdrawal liability than it would under the Plan's interpretation. *See Huber*, 916 F.2d at 96-99. We recognize that an agency's litigating position generally is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the fact that PBGC has taken a position against its own interest suggests that it is firmly convinced that the position is correct. The Brief for the United States in support of the Plan's petition for certiorari, which takes the opposing view on the merits, expressly notes that it does not reflect the views of the PBGC. Brief for the United States as Amicus Curiae at 1-2 n.1.

[9] As noted above, a plan is underfunded if its assets are insufficient to satisfy its liability for *accrued* benefits. Withdrawal lia-

employers from withdrawing from an underfunded plan by requiring such an employer to make additional contributions to the plan even though its employees no longer accrue benefits under the plan.

Section 1381 of ERISA establishes withdrawal liability:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a).[10] The statute then goes on to define the "withdrawal liability" as an allocable amount of the plan's UVB with certain adjustments:

> For purposes of subsection (a) of this section—
>
> (1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 . . . to be the allocable amount of unfunded vested benefits, adjusted
>
> (A) first, by any de minimis reduction applicable under section 1389 . . . ,
>
> (B) next, in the case of a partial withdrawal, in accordance with section 1386 . . . ,
>
> (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399 . . . , and
>
> (D) finally, in accordance with section 1405 . . . .

bility, however, is based on the amount by which the plan's liability for *vested* benefits exceeds its assets. Vested benefits are accrued benefits that have become "nonforfeitable" under the plan or under ERISA's minimum vesting rules. *See* 29 U.S.C. § 1053.

[10] A complete withdrawal occurs when an employer ceases to have an obligation to contribute to the plan or permanently ceases all covered operations under the plan. 29 U.S.C. § 1383. Partial withdrawals are triggered by either a reduction in the amount of the employer's level of contributions or a partial cessation of covered activities. *Id.* § 1385. A partial withdrawal occurs on the last day of the plan year in which the triggering event occurred. *Id.* § 1385(a).

29 U.S.C. § 1381(b)(1).[11] The responsibility for determining and collecting withdrawal liability rests with the plan sponsor—typically, the plan's trustees.[12] Section 1382 provides:

> When an employer withdraws from a multi-employer plan, the plan sponsor, in accordance with this part, shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1382.

In practice, the calculation of an employer's withdrawal liability consists of eight steps:

Step 1—Determine the plan's total amount of UVB. This determination is to be made as of the last day of the immediately preceding plan year. *E.g.*, 29 U.S.C. § 1391(b)(2)(E)(i).[13] Since ERISA requires a valuation of the plan each year in any event, this calculation

[11] Each of the statute's adjustments *reduces* the "allocable amount of the unfunded vested benefits" as determined under § 1391. Thus, the Plan is mistaken in asserting that "Congress intended that the withdrawing employer be fully responsible for its allocated share of unfunded benefits." Brief for Petitioner at 34 ("Pet. Br."); *see aslo id.* at 37; Brief for the National Coordinating Committee for Multiemployer Plans as Amicus Curiae Supporting Petitioner at 11-12 ("NCCMP Br.").

[12] H.R. Rep. No. 869, pt. 1, at 83. Full citations to the legislative history sources cited herein are provided in Appendix B ("App. B.").

[13] For partial withdrawals triggered by a 70 percent contribution decline, this amount is based on the plan's UVB as of the last day of the second preceding plan year. 29 U.S.C. § 1396(a)(1)(B).

will already be made by the plan's actuary. In this case, the governing actuarial valuation report was issued in June 1981. J.A. 161.[14]

Step 2—Allocate a share of UVB to the withdrawing employer. The employer's share of the plan's UVB is calculated pursuant to § 1391. Congress recognized that more than one methodology could be used to allocate a plan's UVB among the contributing employers. Unless the plan is amended to adopt an alternative method, the so-called "presumptive method" governs this allocation. 29 U.S.C. § 1391(b). The presumptive method allocates the plan's UVB to the employers commensurate with each employer's contribution obligation for a 5-year period. *See generally McGill & Grubbs* at 625-26. Other permissible methods—the "modified presumptive" method, the "rolling five" method and the "direct attribution" method—use different formulae for allocating a plan's UVB among the employers. *Id.* at 626-28. In this case, the amount of UVB allocable to Schlitz under § 1391, calculated using the presumptive method, was $23,300,000. *Schlitz*, 3 F.2d at 1001, Pet. App. at A-11; Pet. App. at F-4.

Step 3—Make certain adjustments to produce the withdrawal liability amount. The adjustments specified in § 1381(b)(1)(A) and (B) are made to the amount determined under § 1391 to be the employer's allocable share of UVB. 29 U.S.C. § 1399(c)(1)(A)(i). The *de minimis* adjustment mandated by subparagraph (A) of § 1381(b)(1) generally provides that an employer's allocable share of UVB is to be forgiven if the amount is immaterial. 29 U.S.C. § 1389. The adjustment required by subparagraph (B) applies only in the event of a partial withdrawal and reduces the amount that would be due

[14] Technically, this Plan is valued as of the *first* day of each plan year—January 1. Accordingly, the withdrawal liability calculations in this case were based on the actuarial valuation for the 1981 plan year, which valued the plan "as of Janury 1, 1981." *Id.*

upon a complete withdrawal. 29 U.S.C. § 1386. Neither of these adjustments was implicated in this case; the amount of the withdrawal liability after Step 3 was still $23,300,000.

Step 4—Determine the annual payment amount. The employer's annual payment is determined in accordance with subparagraph (C) of § 1399(c)(1). This amount is based on the employer's contribution history. It is the product of the employer's "contribution base" for the highest three consecutive plan years during the past ten plan years muitiplied by its "contribution rate"—the highest rate at which the employer was obligated to contribute during the past ten years. 29 U.S.C. § 1399(c)(1)(C)(i). In this case, the annual payment of Schlitz was $3,945,481. Transcript of Proceedings before Arbitrator at 689. It should be noted that the amount of the annual payment is established entirely independently of the amount of the withdrawal liability determined in Steps 1-3.

Step 5—Determine the number of years of annual payments necessary to amortize the withdrawal liability amount. This "amortization period" is to be

> calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year.

29 U.S.C. § 1399(c)(1)(A)(i). The interest rate used in determining the length of the amortization period is the one that was used in the plan's most recent actuarial valuation. 29 U.S.C. § 1399(c)(1)(A)(ii).[15] In this case, the interest rate was 7 percent. *See* Pet. Br. at 17.

[15] In most but not all cases, this will be the same interest rate used in the valuation referred to in Step 1.

Step 6—Cap the number of annual payments at 20. Make any adjustment to the payment schedule required by § 1381(b)(1)(C). That provision cross references § 1399(c)(1)(B):

> In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

29 U.S.C. § 1399(c)(1)(B). In other words, any amount of withdrawal liability that remains after twenty annual payments is forgiven.[16] This adjustment did not apply to Schlitz.

Step 7—Create a hypothetical payment schedule. The schedule of annual payments is converted to a schedule of more frequent payments. Section 1391(c)(3) provides:

> Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules.

29 U.S.C. § 1399(c)(3). It is widely accepted that the annual payment amount is converted into quarterly payments by dividing it into four equal amounts, without adding extra interest to the quarterly payments occurring later in the year. *See, e.g.*, PBGC Opinion No. 85-1, 1985 PBGC LEXIS 32 (Jan. 4, 1985); Pet. Br. at 17. This conclusion follows from the statute's direction that the amortization period is to be calculated *as if* each annual payment were made on the first day of each plan year. 29 U.S.C. § 1399(c)(1)(A)(i). The quarterly payments here were $986,370. *See* Pet. Br. at 19.

[16] If applicable, the adjustment specified in subparagraph (D) of § 1381(b)(1) is also made at this point. That provision invokes § 1405, which in essence reduces the liability upon a sale of all or substantially all of the employer's assets or in the case of an insolvent employer undergoing liquidation or dissolution. 29 U.S.C. § 1405.

Step 8—Assign actual due dates to the hypothetical payment schedule. The quarterly payment schedule produced under Step 7 is hypothetical only. Section 1399(c)(1)(A)(i) provides that, while the amortization period is to be calculated *as if* the first payment were made on the first day of the following plan year, "[a]ctual payment shall commence in accordance with paragraph (2)." Thus, the payment schedule produced in Step 7 must be shifted in time so that the first payment coincides with the date on which the statute requires payments to begin —within 60 days after the plan sponsor makes a demand for payment:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand . . . .

29 U.S.C. § 1399(c)(2). The employer must begin making payments in accordance with the demand even if it seeks review of the plan sponsor's determination. *Id.*

* * * *

In this case, the Plan issued the demand on September 29, 1981, relatively shortly after Schlitz had withdrawn. J.A. 153-54. The Plan initially computed the amount of the withdrawal liability using an allocation method other than the presumptive method. Under this "direct attribution" method, the amount of the withdrawal liability was $41,031,406. *See* Pet. Br. at 17.[17] The demand letter stated that the Plan had "determined that the amount of liability of Jos. Schlitz Brewing Company as a result of its complete withdrawal from the Milwaukee Brewery Workers' Pension Plan is $41,031,406." J.A. 153. A payment schedule was included, and demand was made "for payment of the stated employer withdrawal liability, $41,031,406, plus interest, in quarterly installments" in

[17] The court below held that allocation under the direct attribution method was erroneous.

accordance with the payment schedule. J.A. 153-54. The payment schedule included interest for the period from December 31, 1980 (the date as of which the Plan's UVB was calculated)[18] to January 1, 1982 (the date the hypothetical payment schedule began). The first payment of $986,370 was due on November 1, 1981. J.A. 155. Schlitz made this and all other required payments on time.[19]

SUMMARY OF ARGUMENT

One of the principal reforms in MPPAA was the requirement that an employer withdrawing from a multiemployer pension plan pay its "fair share" of the plan's unfunded liability for vested benefits. The withdrawal liability provisions of MPPAA and their legislative history indicate that Congress recognized that the determination of the "fair share" is not a simple task and that a variety of factors must be taken into account. At the same time, Congress sought to streamline the procedures for administering the program to encourage the prompt assessment and timely payment of withdrawal liability.

MPPAA was the result of a lengthy legislative process, and it reflects a delicate balancing of interests—those of

[18] As noted above, the valuation date in this case was really January 1, 1981. January 1, 1981 is virtually the equivalent of December 31, 1980, and we use the latter date in an effort to minimize confusion.

[19] Under the initial payment schedule, Schlitz would have been making payments of withdrawal liability into the next century. *See* Pet. Br. at 17. In 1988, however, the arbitrator ruled that the total withdrawal liability due was $23,300,000, instead of $41,031,406 plus withdrawal year interest. As a result, the payment schedule was shortened to the extent that Schlitz had only one payment left. *See id.* at 19. After the district court ordered payment of withdrawal year interest plus prejudgment interest thereon, Schlitz paid an additional $3,424,150 to the Plan. This amount, plus interest, was returned to Schlitz following the decision of the court of appeals. *See id.* at 21-22.

the plan and its participants and those of contributing employers. The legislative history reveals Congress's view that this balancing of interests was necessary to fulfill the statute's "basic" policy: that participants' interests are best protected by "fostering the growth and continuance of multiemployer plans." 126 Cong. Rec., App. B n.12, at 11,992.

Like ERISA, MPPAA is "comprehensive and reticulated,"[20] and the courts need not engage in gap-filling exercises. The statute does not provide for the assessment of withdrawal year interest, and the legislative history indicates that Congress did not intend to require such interest to be paid. When Congress acts with the care evident in this statutory scheme, it is dangerous to infer additional provisions based on the assumption that Congress "simply forgot" to include them expressly.[21]

Nor does the omission of withdrawal year interest result in a statutory scheme that is unfair or incomplete. A number of assumptions and predictions are necessary to determine the amount of withdrawal liability. To the extent there is a "gap" between the time contributions cease and the time interest begins to accrue, it is likely to be only a few months. Other aspects of the statutory scheme more than offset the effect of such a "gap." If anything, the statute is unduly burdensome to withdrawing employers. There is no reason to resolve any doubts by imposing more onerous liability in the form of an extra year of interest.

[20] *See Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2066 (1993); *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

[21] *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

ARGUMENT

I. THE STATUTE DOES NOT AUTHORIZE THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST

Withdrawal liability is wholly a creature of statute. It gave underfunded multiemployer plans something they did not have before—the assurance that an employer that ceased participating in the plan as a contributing employer would continue to make payments toward satisfying a portion of the plan's underfunding. *R.A. Gray & Co.*, 467 U.S. at 723 n.3. The withdrawal liability provisions evidence a careful balancing of the interests of the plan and the interests of contributing employers. They should be applied as written.

A. The Statute Does Not Explicitly Authorize the Assessment of Withdrawal Year Interest

MPPAA expressly provides for the accrual of interest in two situations. If a scheduled payment is late or if the employer defaults, interest is charged; in each such situation, the statute specifies the date from which interest accrues:

> If a payment is not made when due, *interest* on the payment *shall accrue from the due date until the date on which the payment is made.*

29 U.S.C. § 1399(c)(3) (emphasis added). Similarly,

> In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, *plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. . . .*

29 U.S.C. § 1399(c)(5) (emphasis added). The statute also provides guidance as to the appropriate interest rate:

> Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by [PBGC].

29 U.S.C. § 1399(c)(6).

The foregoing statutory language clearly provides for the assessment of interest on withdrawal liability payments that are not made when due. In the event of default, interest is to be assessed on the total outstanding liability from the date that the first payment was missed. In these situations, interest is to be based on market rates set by PBGC. These interest liabilities create strong incentives for employers to pay their obligations under the statute in a timely manner. Neither of these sections requires interest to be paid in the event that payments are timely made.

B. Use of the Word "Amortize" in the Statute Does Not Require the Addition of Withdrawal Year Interest

The only textually-based arguments made by Petitioner and *amici* to support the imposition of withdrawal year interest rely on the statute's direction to "amortize" the amount of the liability "in level annual payments . . ., calculated as if the first payment were made on the first day" of the plan year following withdrawal. *See* Pet. Br. at 24-25; Central States Br. at 12-13; NCCMP Br. at 8-9. Those arguments lack merit and should be rejected.

Use of the word "amortize" in the statute implies nothing about *when* interest begins to accrue. It does, however, together with two other provisions, suggest that an interest factor is used in computing the amortization period:

- Subparagraph (1)(A)(i) of § 1399(c) provides that the schedule of payments is to extend for a number of years adequate to "amortize" the withdrawal liability, calculated as if payments began

on the first day of the plan year following withdrawal and continued to be made on the first day of each subsequent plan year. 29 U.S.C. § 1399 (c)(1)(A)(i).

- Subparagraph (1)(A)(ii) requires that the determination of this amortization period be "based on the assumptions used for the most recent actuarial valuation for the plan." 29 U.S.C. § 1399(c)(1)(A)(ii).
- Paragraph (6) of § 1399(c) provides that interest under subsection (c) is to be charged at prevailing market rates, "[e]xcept as provided in paragraph (1)(A)(ii)." 29 U.S.C. § 1399(c)(6).

Taken together, these provisions suggest that the payment schedule should be calculated to reflect a factor for interest on the unpaid withdrawal liability and that the interest rate used for this purpose should be based on the plan's recent actuarial assumptions. Certainly, it is customary (if not mandatory) for an amortization calculation to include an interest component, and the plan's most recent valuation will necessarily require the actuary to make interest rate assumptions.

Thus, Petitioner's arguments about the dictionary definition of "amortize" are beside the point. Respondents do not dispute the use of an interest factor in calculating the schedule of payments under the statute.[22] The question in this case is not whether interest ever accrues—it obviously does—but whether interest is assessed for the year in which withdrawal occurs. A dictionary is of no use in resolving this question.

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[22] Accordingly, in this case at the end of the payment schedule Schlitz had made aggregate payments totalling $28,498,691—the amount necessary to amortize $23,300,000 in annual payments of $3,945,481 using a 7 percent interest factor.

C. The "Withdrawal Liability," as Defined in the Statute, Does Not Include Withdrawal Year Interest

In § 1399(b)(1), the plan sponsor is directed to inform a withdrawing employer of "the amount of the liability" and "the schedule for liability payments." 29 U.S.C. § 1399(b)(1)(A). The statute thus distinguishes between these two concepts—"the amount of the liability" and "the schedule for liability payments." As we have just seen, the schedule for liability payments includes interest at the plan's actuarial rate. In this section, we explain that the amount of the liability does not.

For all its complexity, the statute defines "withdrawal liability" in a straightforward manner. It is "the amount determined under section 1391 . . . to be the allocable amount of unfunded vested benefits," with four specified adjustments. 29 U.S.C. § 1381(b)(1). At this stage of the litigation, it has been determined that the allocable amount of the Plan's UVB under § 1391 was $23,300,000. *See* Pet. Br. at 24 n.17. It is also undisputed that none of the adjustments listed in § 1381(b)(1) applied. *Id.* at 15 n.12. Thus, the "withdrawal liability" as defined by § 1381(b)(1) was $23,300,000.[23] The dispute between the parties concerns whether interest for the withdrawal year is to be added to that amount and amortized by the scheduled payments.

According to § 1399(c)(1)(A)(i), the amount to be amortized is the amount of the "withdrawal liability" before making the adjustments called for by § 1381 (b)(1)(C) and (D). Section 1399(c)(1)(A)(i) provides:

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[23] Petitioner concedes this, albeit somewhat obliquely. According to Petitioner, "Schlitz' withdrawal liability, as defined in section [1381](b) and as originally calculated by the Plan's actuary, was $41,031,406." *Id.* at 15-16 n.12. Petitioner refers to the actuary's original calculation, in which the direct attribution allocation method was used erroneously. The parallel amount computed under the presumptive method was $23,300,000.

> [A]n employer shall pay the amount determined under section 1391 . . . adjusted if appropriate under section 1389 . . . [the *de minimis* adjustment required by § 1381(b)(1)(A)] and then under section 1386 . . . [in the case of a partial withdrawal as directed by § 1381(b)(1)(B)] over the period of years necessary to amortize the amount in level annual payments . . . .

29 U.S.C. § 1399(c)(1)(A)(i).[24] Once again, since neither of these adjustments applied in this case, the amount to be amortized by Schlitz was $23,300,000.

Thus, Schlitz takes the position that the principal balance of "the amount of the liability" as of the hypothetical first payment date—January 1, 1982—was $23,300,000. It follows that the principal balance on the *actual* first payment date—November 1, 1981—was also $23,300,000, since the actual payment schedule is simply the hypothetical payment schedule shifted in time.

The Plan and *amici* disagree, however. The Plan asserts that the principal balance as of January 1, 1982—the hypothetical first payment date—was $24,931,000 instead of $23,300,000. Pet. Br. at 28. The difference of $1,631,000 (7 percent of $23,300,000) is attributable to accrued interest at 7 percent from December 31, 1980 (the valuation date) through December 31, 1981. *Id.* The Plan appears to be suggesting that the starting principal balance is $23,300,000, but that the hypothetical payment schedule begins on the valuation date—December 31, 1980—even though payments are not presumed to begin until January 1, 1982, one year later. *Amicus* NCCMP makes a similar point—in its view, the "first period" in the payment schedule runs from the valuation date (December 31, 1980) to the hypothetical first payment date (January 1, 1982). *See* NCCMP Br. at 8-9.[25]

Amicus Central States arrives at the same result as the Plan using a different approach. Like Schlitz, it would begin the hypothetical payment schedule on January 1, 1982, but "the beginning principal balance" on that date would include an adjustment that is the equivalent of the addition of interest for one year. Under the approach taken by Central States, the "beginning principal balance —the withdrawal liability" in this case was $23,300,000, plus the equivalent of interest for one year at 7 percent ($1,631,000). *See* Central States Br. at 11-12.[26] Cen-

[24] Section 1399(c)(1)(A)(i) begins with an introductory phrase that lists exceptions to the general rule. "Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5)," the rule is as stated in text. Subparagraph (B), which we have already discussed, caps the number of annual payments at 20. Subparagraph (D) eliminates the 20-year cap in instances of a "mass withdrawal" of employers or termination of the plan. Paragraphs (4) and (5) provide for prepayment by the employer and acceleration by the plan, respectively. Those provisions are discussed separately.

[25] NCCMP states that "for purposes of establishing the amortization schedule, the statute *deems* the first payment to occur at the end of the first period, and interest, pursuant to standard amortization practices, begins to accrue from the beginning of such period, *i.e.*, the date as of which the outstanding balance on the liability was calculated." *Id.* at 9. In our view, however, the "first period" of the hypothetical amortization schedule is not the period between the valuation date and the presumed first payment date. It is instead the period from "the first day of the plan year following the plan year in which the withdrawal occurs," 29 U.S.C. § 1399(c)(1)(A)(i), until the first day of the subsequent plan year—in this case from January 1, 1982 to January 1, 1983. The first period of the *actual* payment schedule under our reading of the statute was from November 1, 1981 to November 1, 1982. In the Third Circuit's parlance, we view the statute as creating an "annuity-due," rather than an "immediate annuity." *See Huber*, 916 F.2d at 98.

[26] Central States's explanation for its approach is not convincing. It asserts, "Withdrawal liability is defined as the end result of a series of adjustments to the employer's UVB share, *including ad-*

tral States says that the addition to the $23,300,000 figure is not really interest; it is rather a "discount adjustment" made to reflect the time value of money. Central States Br. at 11. The result is the same, however, as Central States acknowledges. *See id.* at 13.

In effect, Petitioner and *amici* would add a step to the calculation process described in our counter-statement of the case. After making the adjustments prescribed in § 1381(b)(1)(A) and (B) (Step 3) and determining the amount of the annual payment (Step 4), they would either add interest for the withdrawal year or reverse the "excess discount." Nothing in the statute authorizes this additional step. Under either approach, Schlitz would have amortized not $23,300,000 but $24,931,000 between the first and the last payments of the payment schedule. This is because the hypothetical payment schedule is shifted so that the *actual* first payment was due on November 1, 1981, and the principal amount of the liability at that time would have been $24,931,000 under the approaches of the Plan and *amici*.

D. Assessment of Withdrawal Year Interest Requires a Strained and Illogical Reading of the Statutory Language

The positions of the Plan and *amicus* NCCMP suffer from an additional flaw: they assume Congress provided for interest to accrue on a liability that had not yet matured. Congress could have legislated that result, but it is unlikely that it did. As the court of appeals noted, "Schlitz was not liable for one penny until it withdrew from the Plan and received a notice of liability." 3 F.2d at 1004, Pet. App. at A-17. The statute states that

justments to the payment schedule." Id. at 12 n.10 (emphasis added). But the only "adjustment[] to the payment schedule" authorized in § 1381(b)(1), which defines "withdrawal liability," is to cap the number of annual payments at 20. 29 U.S.C. §§ 1381(b)(1)(C), 1399(c)(1)(B).

"[w]ithdrawal liability shall be payable . . . beginning no later than 60 days after the date of the demand." 29 U.S.C. § 1399(c)(2). Before Schlitz withdrew from the Plan, it made all contributions required of it; after it withdrew, it made all payments of withdrawal liability on time. It seems quite anomalous that Schlitz should have incurred an additional interest liability of $1,631,000 even though it fully and timely complied with all of its payment obligations.

That Schlitz should be charged withdrawal year interest is also inconsistent with the statute's prepayment rule. Section 1399(c)(4) provides:

> The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, *if any*, in whole or in part, without penalty. . . .

29 U.S.C. § 1399(c)(4) (emphasis added). The "if any" language here indicates that there will be instances in which no interest will have accrued at the time of prepayment. Realistically, this could happen only if the principal balance at the time payments commence does *not* include "accrued interest" and the employer pays off the entire amount on the day its first payment is due. The positions of Petitioner and *amicus* NCCMP render the "if any" language meaningless.[27] If interest for the

[27] In an effort to find some reason for the "if any" qualification without denying withdrawal year interest, the *Huber* court speculated as follows: "The employer may pre-pay the outstanding principal amount of the withdrawal liability at any time during the amortization period, including at a point immediately after a scheduled payment, at which point all accrued interest has been paid." 916 F.2d at 99. This scenario is artificial and strained. It assumes that an employer would make a scheduled payment and then on the same day pay off the balance. It further assumes that such payments made at the same time would be treated as two separate payments—one including principal and interest and one of principal only.

withdrawal year is always added, there could never be a prepayment *without* accrued interest.

The record in this case illustrates this point. In the demand letter to Schlitz, the Plan stated, "the amount of liability . . . is $41,031,406 [$23,300,000 under the presumptive method]." J.A. 153.[28] This amount does not include withdrawal year interest. The Plan's actuarial expert testified that, if the liability had been paid in its entirety on the day the first payment was due, the amount would have been "the forty-one million without interest, without any other interest other than what was involved in developing the forty-one million in the first place." Transcript of Proceedings before Arbitrator at 811-12 (Levy). Indeed, Mr. Levy testified, "I don't think the statute refers to interest accruing on forty-one million." *Id.* at 813. We believe the Plan's expert was correct on this point. Nothing in the statute authorizes plans to "gross up" the § 1391 amount by adding withdrawal year interest.

Nor, contrary to the assertions of Petitioner and *amicus* NCCMP, does our "interpretation" fail to give effect to every part of the statute. *See* Pet. Br. at 37-39; NCCMP Br. at 11. According to this argument, the hypothetical payment schedule called for in § 1399(c)(1)(A)(i) serves no purpose unless withdrawal year interest is assessed. But it serves an important purpose under our reading of the statutory scheme: it enables the plan to establish a hypothetical quarterly payment schedule for every employer as soon as the prior year's actuarial valuation is complete. The plan can readily prepare an actual payment schedule by simply adjusting the payment dates to begin within 60 days after demand. This helps

[28] It will be recalled that the withdrawal liability of Schlitz, as originally calculated under the wrong allocation method, was approximately $41,000,000. This is the same as the $23,300,000 amount calculated under the proper allocation method.

ensure that the period during which the employer is not making payments to the plan is as brief as possible.

The significance of the provision lies in its creation of a hypothetical payment schedule and not in the date on which the hypothetical schedule begins. Congress could have chosen any date as the beginning point for constructing the hypothetical payment schedule; it chose the first day of the plan year following withdrawal.[29]

In summary, if the statute is applied as written, the amount of the liability to be satisfied during the amortization period in this case was $23,300,000. The amortization period began on November 1, 1981, the date on which the first payment was due from Schlitz. Neither the addition of withdrawal year interest nor an "excess discount adjustment" is authorized by the statute.

II. THE LEGISLATIVE HISTORY CONFIRMS THAT THE STATUTE DOES NOT AUTHORIZE THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST

MPPAA was the product of extensive study and interaction between Congress and the PBGC. Congress recognized that the statutory provisions of ERISA as enacted in 1974 might not be adequate to deal with the particular problems of multiemployer plans. PBGC was formally requested to study the problems of multiemployer plans and make recommendations. *See* S. Rep. No. 570, 95th Cong., 1st Sess. 1-4, *reprinted in* 1977 U.S.C.C.A.N. 4128, 4128-31. This PBGC study was transmitted to Congress in June 1978. In May 1979, the Administration formally submitted legislation recommended by PBGC, which was introduced in identical bills in both houses of Congress. App. B nn.1, 2.

The PBGC-authored bills were subject to hearings and modifications by four congressional committees during

[29] The fact that a statutory provision could have been written in a different way with the same effect is not unusual or surprising. This situation is distinct from one where an interpretation renders a statutory provision meaningless.

1979 and 1980, with final enactment in September 1980. Appendix B to this brief sets forth the legislative history of MPPAA in greater detail.

A. The Legislative Purpose Does Not Require the Statute to Be Interpreted So as to Maximize the Amount of Withdrawal Liability

At the outset, we should deal with the argument that MPPAA was intended to benefit plans and their beneficiaries, and thus that the interest question should be resolved so as to maximize liability. Pet. Br. at 23, 32, 40. This is the sort of argument that gives resort to legislative history a bad name. This Court has repeatedly warned that it is not proper to assume that a statute has such monolithic effect.

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (*per curiam*); *LTV Corp.*, 496 U.S. at 646-47 (same quotation); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986).

Statutes generally serve a variety of purposes and are often the product of legislative compromise. This is certainly the case for MPPAA. In fact, the House Committee on Education and Labor made this very point: "The bill as reported out by the committee represents an effort to strike an appropriate balance among conflicting interests and needs." H.R. Rep. No. 869, pt. 1, at 63. According to one of the bill's Senate sponsors, "in order to develop a consensus in support of the legislation, it was necessary to make compromises. I doubt that any one group that had an impact on this legislation

is pleased with all of it." 126 Cong. Rec., App. B n.13, at 20,178 (statement of Sen. Javits); *see also id.* at 20,185 (statement of Sen. Long).

The legislative history of MPPAA is replete with evidence that the legislation was designed to serve a variety of purposes. One purpose was to deter withdrawals and enhance the financial security of plans when withdrawals occur. *See, e.g.*, H.R. Rep. No. 869, pt. 1, at 65. This purpose would be served by any interpretation that maximizes the amount of money paid by a withdrawing employer.

But the basic policy behind the legislation, stated time and again, was Congress's realization that "the retirement income security of multiemployer plan participants is best assured by fostering the growth and continuance of multiemployer plans." 126 Cong. Rec., App. B n.12, at 11,992; *see also, e.g.*, H.R. Rep. No. 869, pt. 1, at 51; H.R. Rep. No. 869, pt. 2, at 4. This policy would be frustrated if the withdrawal liability imposed on employers was too harsh. New employers would be reluctant to enter multiemployer plans, and employers contributing to healthy plans would have an incentive to leave rather than risk incurring a substantial liability later. *See* 126 Cong. Rec., App. B n.13, at 20,181 (statement of Sen. Dole) (protecting employers is not inconsistent with the interests of employees, since such measures reduce the likelihood of plan termination).

Among the purposes of the legislation, designed to implement its basic policy, were (1) to be equitable; (2) to limit the financial burden imposed on withdrawing employers; and (3) to encourage new employers to join plans.[30] Another strand that runs through the legislative

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[30] *See, e.g.*, 126 Cong. Rec., App. B n.15, at 23,284 (statement of Sen. Dole) (noting that burden of withdrawal liability on employers might be "too great to bear"); 126 Cong. Rec., App. B n.13, at 20,178 (statement of Sen. Javits) ("employer relief" provisions were added to "impose withdrawal liability in an equitable and feasible

history is the desire to simplify the procedures for calculating and promptly collecting withdrawal liability payments.[31] Imposing additional liability on withdrawing employers does not necessarily serve this purpose.

B. The Drafting History Demonstrates That No Provision of the Statute Was Adopted with the Intent or Effect of Requiring Withdrawal Year Interest

As enacted by Congress, MPPAA included the key features of the original bills that were drafted by the PBGC. However, the legislative process caused a number of changes to be made. This drafting history confirms that Congress did not intend to require withdrawal year interest.

The legislative history also reflects significant opposition to the concept of imposing withdrawal liability and the need for proponents of the legislation to compromise by agreeing to provisions that substantially limited the amount of liability that would be imposed.[32] Thus, it cannot be assumed that all changes made during the legislative consideration of this bill were designed to increase the amount of withdrawal liability. Indeed, the contrary assumption seems more likely to be warranted: that most changes were made in order to placate concerns about excessive liability and thus were designed to reduce the amount that a withdrawing employer would have to pay.

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manner"); H.R. Rep. No. 869, pt. 2, at 15 (committee intends that withdrawal liability rules not deter new employers from entering a multiemployer plan).

[31] *E.g.*, H.R. Rep. No. 869, pt. 2, at 3; 126 Cong. Rec., App. B n.12, at 11,998 (statement of Rep. Rostenkowski); 126 Cong. Rec., App. B n.14, at 23,039, 23,041 (statement of Rep. Thompson).

[32] *See, e.g.*, 126 Cong. Rec., App. B n.13, at 20,177 (statement of Sen. Williams) (noting that relief was provided to withdrawing employers in order to "balance the needs of employers and the plan"); 126 Cong. Rec., App. B n.14, at 23,004 (statement of Rep. Thompson).

1. *The Original PBGC Proposal*

As originally introduced in the House and Senate, these bills provided a relatively simple scheme:

- A withdrawing employer would be responsible for an allocated share of the unfunded vested benefits of the plan determined as of the most recent plan year ending before the date of withdrawal. S. 1076, § 4201(d).
- The employer was required to pay this amount of withdrawal liability, plus accrued interest at market rates from the date of withdrawal. *Id.* § 4201 (a)(1), (e)(5).
- The withdrawal liability, plus accrued interest, could be paid in amounts equal to the prior level of contributions or in the amount necessary to fully amortize the liability over a period of 15 years, whichever is greater. *Id.* § 4201(e)(2).

App. B n.2.

These provisions for withdrawal liability were subject to a great deal of controversy and modification during the legislative process. The original PBGC proposal and all of the subsequent versions of the bill contained "gaps"—as Petitioner and *amici* use that term—in plan funding. The only text providing for the accrual of any withdrawal year interest was contained in the original PBGC proposal, which stated that interest would accrue from the date of withdrawal. That text was eliminated in the first mark-up.

2. *The Initial Mark-up*

The first mark-up of this legislation occurred in the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor on December 13, 1979. *See* App. B n.8. At this point, a number of changes were made in the original bill regarding the procedures for calculating and paying withdrawal liability.

- Several alternative methods for determining the amount of the withdrawing employer's share of unfunded vested benefits were provided. Under the presumptive method, the employer's liability could not be calculated until the valuation was completed for the end of the plan year in which withdrawal occurred. Other methods used the valuation at the end of the plan year prior to withdrawal. H.R. 3904, § 4201(e), (f), (g).
- The requirement that interest accrue from the date of withdrawal was deleted. The only explicit references to interest were contained in provisions that were made for interest to accrue at market rates in the event that a payment is not made when due or in case of a default. *Id.* § 4201(i)(3), (4), (5), (7).
- The prepayment provision was amended to insert the words "if any" following the reference to "accrued interest." *Id.* § 4201(i)(6).
- The schedule of payments for the withdrawal liability was to be made up as if each annual payment were made at the *end* of the year in which due, with the determination of the amortization period based upon the assumptions used in the plan's most recent actuarial valuation. *Id.* § 4201(i)(2)(A).
- The employer's annual payments were to be based on the prior level of plan contributions and capped at 30 years even if a longer period would be necessary to fully amortize the liability. *Id.* § 4201(i)(2)(A), (B).
- The actual payment schedule would not start on the date of the hypothetical annual payment schedule as provided above, but by converting it to four equal quarterly payments due beginning 60 days after the demand for payment is made. *Id.* § 4201(i)(3).

Most of the foregoing changes survived into the final version of the bill as enacted. Because the statute traces many of its provisions on interest to this mark-up, we have reproduced in Appendix A a comparison of the pertinent provisions of the original bill, as amended during this mark-up, and as enacted.

Following the subcommittee mark-up, the staff of the Joint Committee on Taxation prepared a description of the bill, as amended, for use by the House Committee on Ways and Means at a hearing held on February 19, 1980. This staff analysis contains a description of the liability payment provisions described above. Included in this analysis is the following illustration:

> For example, assume that an employer's withdrawal liability is $1 million and that the plan's valuation rate of interest is 6 percent. Assume that [the statutory formula requires an annual payment] of $63,750. This would result in an amortization of the liability over approximately 49 years. Because the 49-year schedule is longer than 30 years, the employer would be liable to the plan for 30 annual payments of $63,750.

Ways & Means Hearing, App. B n.5, at 21 (Feb. 19, 1980). Although nowhere explained in the staff report, it turns out that this illustration must have been calculated with the first of the 49 annual payments including a year of interest at 6 percent. This was not surprising, since the subcommittee mark-up language that was the basis for this illustration provided for calculating the schedule as if each annual payment was made at the *end* of the year when due.[33] Thus, the first year in

[33] In other words, it takes 48 annual payments of $63,750 paid at the end of each year, plus a final payment of about $40,000 at the end of the 49th year, to amortize $1 million at 6 percent. If the payments are made at the *beginning* of each year, however, it takes less than 38 annual payments of $63,750 to amortize $1 million at 6 percent. *See* NCCMP Br. at 10-11 n.9. Forty-nine such

which interest accrued was not the withdrawal year but the following year.

3. *Subsequent Changes and Final Enactment*

H.R. 3904 was reported by the Education and Labor Committee on April 2, 1980, and by the Ways and Means Committee on April 23, 1980. *See* App. B nn.9, 10. As reported by both committees, the provisions of this bill relating to the calculation and payment of withdrawal liability were very close to the subcommittee mark-up. One important difference was as follows:

> • Instead of being calculated as if each payment were made at the end of the year when due, the hypothetical schedule is to be calculated as if payment were made on the first day of the plan year following withdrawal and each subsequent payment on the first day of each subsequent plan year. H.R. 3904, § 4201(i)(2)(A)(i).

H.R. Rep. No. 869, pt. 1, at 15. Notwithstanding this change in the assumed payment date from the end of the year to the beginning of the year, the illustration quoted above from the Joint Tax Committee staff report was reproduced in the two committee reports without alteration. *Id.* at 83; H.R. Rep. No. 869, pt. 2, at 27-28.

Following floor debates on May 21 and 22, H.R. 3904 was passed by the House on May 22 without further amendment in the provisions at issue here. *See* App. B n.12.

On the Senate side, the companion bill was reported jointly by the Labor and Human Resources Committee and the Finance Committee with amendments on July 24, 1980, and passed by the Senate on July 29 as an amendment in the nature of a substitute for H.R. 3904. *See* App. B nn.11, 13. There was no formal committee

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payments, if paid at the beginning of each year, would amortize about $1,060,000 ($1 million plus one year of interest at 6 percent).

report on the Senate side, but a joint explanatory statement of the sponsors was entered into the Congressional Record as part of the debates. App. B n.11. Again, the illustration developed by the Joint Tax Committee staff was picked up without significant change. 126 Cong. Rec., App. B n.11, at 20,197 (Joint Explanation of S. 1076). With regard to the method of payment, the only major differences between the House and Senate versions at this point were that the Senate bill had a formula for calculating the amount of the annual payment that was more favorable to the withdrawing employer and the period over which payments were to be capped was shorter (20 years). S. 1076, § 4219(c)(1)(B), (C).

Thereafter, the Senate and House each passed slightly different versions of the bill with additional amendments. *See* App. B nn.14, 15. Significantly for our purposes, the version passed by the House on August 25, 1980, provided that the allocation of unfunded vested benefits under the presumptive method would be made as of the plan year ending *prior* to the year of withdrawal instead of the plan year ending *after* withdrawal. H.R. 3904, § 4211(b). The House accepted the Senate's 20-year cap on the payment schedule but insisted on its own, more onerous formula for determining the amount of the annual payment. H.R. 3904, § 4219(c)(1)(B), (C). The Senate ultimately accepted these revisions, although a conference committee was convened and reported briefly on a few unrelated issues. *See* App. B n.18. The conference committee report was accepted in both houses, and the bill was signed into law by President Carter on September 26, 1980. App. B nn.19-21.

4. *Summary of the Impact of Drafting Changes on Interest Accrual*

At each stage of the drafting process, the impact of the resulting language on interest accrual can be determined, as summarized below. This history confirms that no changes were made with either the intent or the effect

of imposing interest on the withdrawing employer for the year in which withdrawal occurs.

The original PBGC-authored bill.—This language quite explicitly provided that withdrawal liability was calculated as of the end of the plan year before withdrawal, and that interest would accrue at market rates from the date of withdrawal until the first payment was actually made, and thereafter on the remaining balance until paid. Result: first payment necessarily includes some withdrawal year interest, with the actual amount depending upon when the withdrawal occurs and how long it takes the plan to calculate the employer's share of UVB and demand payment.

The initial mark-up.—This version provided that withdrawal liability would be calculated either at the end of the plan year prior to the year of withdrawal (all methods except the presumptive method) or at the end of the plan year during which withdrawal occurred (the presumptive method) and that interest would accrue at the actuarial rate from the first day of the plan year beginning after withdrawal until the presumed date of the first annual payment at the end of that year. Result: first year's payments include one year of interest. However, none of this is withdrawal year interest because the presumed first payment date is the *end* of the plan year *after* the year in which withdrawal occurs.

The bill as reported on the floor and initially passed in both houses.—These versions were identical on the relevant points to the initial mark-up version, except that the first annual payment was presumed to be made on the *first* day of the plan year after withdrawal. The House and Senate differed only on the formula for determining the amount of the annual payments and the number of years of the payment cap. Result: first year's payments include no interest.

The statute as finally enacted.—This language was identical to prior versions in all material respects, except that

under the presumptive method, the valuation date for determining the amount of UVB was moved to the end of the plan year *prior* to withdrawal. Result: first year's payments include no interest. The change in the valuation date for the presumptive method makes no change in the provisions governing accrual and payment of interest as part of preparing the schedule of payments.

C. Petitioner's Reading of the Legislative History Is Incorrect

Based on the foregoing analysis, we can see that the legislative history arguments made by Petitioner are erroneous. The committee reports' illustration of how liability is to be calculated is not consistent with Petitioner's position (Pet. Br. at 40 n.22) because it was prepared for a version of the bill that included a year of interest in the first presumed payment, but it was a year of interest beginning *after* the year in which withdrawal occurred. Once the bill was changed to make the presumed first payment occur at the beginning of that year, the statutory basis for including a year of interest in the first payment was eliminated. Thus this illustration from the legislative history supports Respondents' interpretation of the statute and is inconsistent with Petitioner's position.[34]

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[34] As applied to the version of the statute reported to the floor of the House and Senate, the illustration also makes no sense. In those versions, the presumptive method provides for UVB to be measured as of the end of the plan year in which withdrawal occurs. If the first payment is presumed to be made on the first day of the following year, there should be at most one day of interest, not one year.

It is understandable that the committees reporting this bill did not change this illustration when the bill language changed, because it was included in the report to illustrate how the 30-year or 20-year payment cap would operate, not to illustrate the date on which interest would begin to accrue. Moreover, the example was not originally prepared by the staff of the committees reporting this legislation but by the staff of the Joint Committee on Taxation. It is not apparent on the face of the example that first-year interest was included in calculating the amortization schedule.

Petitioner's argument that Congress considered and rejected the idea of limiting interest to the period after withdrawal (Pet. Br. at 40-41) is also based on an incomplete understanding of the legislative history. There was never any conflict between the Senate and the House on the provisions that are relevant to this issue. The bills introduced in each house were identical. Identical changes in the statutory language that governs this issue were made in each body at the same stage of the legislative process. Although there were other differences that had to be worked out between the two bodies, there is no evidence of conflict regarding the accrual and payment of interest.

It is true that Congress eliminated the provision in the original PBGC bill that provided for interest to accrue from the date of withdrawal. This does not mean that Congress wanted interest to accrue *before* the date of withdrawal. At the time the PBGC language was eliminated, the effect was to make interest begin to accrue at the beginning of the plan year *after* withdrawal. This is confirmed by the staff illustration prepared at that time. Thereafter, no changes were made in the legislative language that can be identified as having either the intent or effect of moving the interest accrual date to start prior to withdrawal.

Under the versions of the bill after the initial markup and as initially passed by the House and Senate, the valuation date under the presumptive allocation method was the end of the plan year after withdrawal. Because the effect of this change from the PBGC bill was to eliminate the "gap" between the valuation date and the date on which interest begins to accrue, Petitioner suggests that Congress did not need to address the question of interest for any "gap" period. This may be true, but when the valuation date was moved back to the end of the prior plan year, the "gap" was reintroduced, and Congress made no change in the legislative language to provide for interest to be charged for the "gap" period.

Moreover, even under the earlier versions, a "gap" existed. In the original PBGC bills, there was an interest "gap" between the valuation date and the withdrawal date. In subsequent versions of the bill, the alternative (non-presumptive) methods for allocating UVB employed as their last valuation date the end of the plan year *prior* to withdrawal. Since, as Petitioner concedes and as described above, these versions provided for interest to accrue at the beginning of the plan year *after* withdrawal, there would remain a "gap" period. Thus, at every stage of the legislative process, the bill under consideration included a potential "gap." There is no indication that Congress ever adopted changes in the legislative language with the intent or effect of eliminating such "gaps."

D. The Legislative History Demonstrates That Withdrawal Year Interest Is Not Required

It seems reasonably clear from the foregoing drafting history that Congress was concerned that the original PBGC bill could cause excessive amounts of liability to be imposed on withdrawing employers. Although most of the legislative attention was focused on the formula for calculating the annual payment amount and capping the number of such payments, there was also an awareness that interest charges under the original PBGC bill could have been excessive. *See Ways & Means Hearing*, App. B n.4, at 15 (statement of Richard H. Fay).

The changes in the interest rate and accrual generally served to reduce the amount of interest liability for withdrawing employers who paid their obligations on a timely basis. These changes also simplified the task of calculating the amount of payments and gave plans the ability and incentive to promptly demand and collect these payments. The legislative history confirms that Congress was very concerned that withdrawal liability payments begin promptly. *See* 126 Cong. Rec., App. B n.14, at 23,039 (statement of Rep. Thompson). These concerns fully explain the reasons behind the drafting changes that were made.

In particular, the change in the valuation date under the presumptive method in the final version of the bill was most likely made in order to speed up the ability of plans to assess and collect withdrawal liability payments. Under the version initially passed in both houses, plans using the presumptive method would have to wait until after receiving the valuation prepared as of the end of the plan year in which withdrawal occurred.[35] This requirement would cause 6 to 18 months of delay in assessing the withdrawal liability, depending upon how early or late in the year the withdrawal occurred. By moving the valuation date to the end of the prior year, the statute as enacted reduced the time necessary to assess and collect from the withdrawing employer by a year in most cases. There is no indication that Congress thought this change of valuation date required the imposition of an additional year of interest liability on the withdrawing employer.

The foregoing account of the drafting history and the reasons for the changes thus supports our view that none of the language of the statute was adopted with either the intent or the effect of imposing interest liability for the year in which withdrawal occurs.

III. THE STATUTORY SCHEME DOES NOT RESULT IN AN UNFAIR "GAP"

Petitioner asserts that our interpretation of the statute creates a "gap" in plan funding that Congress could not have intended. Pet. Br. at 35-36. *Amici* complain that our reading of the statute causes "the payment of too little withdrawal liability." NCCMP Br. at 13; *accord* Central States Br. at 11. These arguments should be rejected.

As explained above, the statute does not authorize the assessment of withdrawal year interest. If the Plan re-

[35] Actuarial valuations typically take several months to prepare after the conclusion of the plan year. In this case, the governing actuarial valuation report was issued on June 17, 1981. J.A. 161. The Plan's 1979 actuarial report was issued on August 13, 1979, and the initial 1980 report states that it was prepared in May 1980. These reports appear in the record as part of Stipulated Exhibit 146.

ceived the amount of withdrawal liability that Congress said it was entitled to receive, then by definition Schlitz did not pay "too little withdrawal liability." Petitioner and *amici* may believe that it was unwise or unfair for Congress to have defined withdrawal liability as it did. But that is a complaint that can be redressed only by Congress itself.

In any event, the statutory scheme is not unfair to plans. There is no "gap" in funding that threatens the security of participants' retirement benefits. *See* Pet. Br. at 32, 33, 36. In addition, the statute includes a number of simplifying devices that have the effect of easing the administrative burden on plan sponsors. Some of these simplifications decrease the amount of the liability a withdrawing employer is required to pay. It was perfectly rational for Congress to have employed simplifying measures in the interest of enhancing efficiency, even at the expense of precision. Manifestly, the statute is not so unfair in its treatment of plans that the Court need resort to resolving any uncertainties in their favor.

A. In Most Cases Any "Gap" Will Be Considerably Less Than One Year

Petitioner warns that our reading of the statute produces a harmful "gap" in funding. *E.g.*, Pet. Br. at 33. But there need not be a substantial amount of time during which the plan does not receive payments from the withdrawing employer.

It must be kept in mind that the withdrawing employer is likely to make contributions to the plan for some or most of the year during which it withdraws. These contributions are required by statute to include payments to reduce the plan's unfunded liabilities. Under ERISA's minimum funding standards some portion of employer contributions to a plan must be applied to reduce the plan's underfunding. I.R.C. § 412(b)(2)(B)(i), (ii). Indeed, requiring amortization of the principal amount of a plan's accrued liability was the key innovation of

ERISA's funding rules.[36] Under the statutory scheme, then, it is fair to assume that a plan's underfunding will gradually *decrease* over time as contributions are received.

Therefore, no "gap" could begin until withdrawal and the cessation of contributions. Inevitably there will be some delay between withdrawal and the commencement of withdrawal liability payments. But the average period between the time contributions stop and the time payments of withdrawal liability begin need not be significant. Congress has created a scheme under which an employer's hypothetical payment schedule could be prepared as soon as the prior year's actuarial valuation is completed—probably about mid-year.[37] If an employer withdrew *after* the valuation was in hand, the plan sponsor could make its demand within a matter of days and payments would begin not later than 60 days thereafter. The delay would be longer if an employer withdrew toward the beginning of the plan year, before the actuarial valuation report was issued. But in the absence of unusual circumstances, the average "gap" should be no longer than a few months.[38]

Indeed, Petitioner's position unfairly assesses one year of interest when the "gap" can be much shorter. This was the situation in this case, and the Plan's interpretation of the statute results in a double assessment for a portion of

[36] Under prior law, there were no statutory funding rules. A revenue ruling issued by the Internal Revenue Service, however, had the effect of requiring funding sufficient to satisfy normal cost and *interest only* on past service liability. *See* Rev. Rul. 56-596, 1956-2 C.B. 288; *McGill & Grubbs* at 49.

[37] *See supra* note 35.

[38] More delay inheres in the scheme with respect to partial withdrawals, because calculation of the liability upon a partial withdrawal requires data that is not available until the end of the plan year following the partial withdrawal. 29 U.S.C. § 1386(a)(2). By definition, however, partial withdrawals have less impact on plan funding than complete withdrawals. The employer continues making *some* contributions, and under ERISA minimum funding rules some portion of the contributions to the plan must be applied to reduce the plan's underfunding.

the withdrawal year. Schlitz withdrew from the plan in August and began making payments of withdrawal liability shortly before November 1, 1981, and yet the Plan seeks to charge it a full year of interest.

Of course, in a given case the delay in making demand could be significantly longer—it took the *Huber* plan well over two years to make its demand. *See Huber*, 916 F.2d at 88. But such delays are the fault of the plan, not the withdrawing employer, and this feature of the statutory scheme creates an incentive for plans to act promptly to assess and collect withdrawal liability payments.[39]

B. Other Aspects of the Statutory Scheme Offset the Effect of Any "Gap"

The statutory scheme uses a "snapshot" of the Plan's UVB as of the end of the prior year as the basis for determining the amount of withdrawal liability. The actual amount of UVB is imprecise and can rise or fall over the course of the year. These fluctuations are likely to offset the effects of any gap in interest paid during the year of withdrawal.

In the first place, actuarial "science" is imprecise by nature. *See Concrete Pipe*, 113 S. Ct. at 2286. The amount of a plan's liability for future benefits cannot be known with certainty, since it depends upon future events. Using accepted actuarial principles, it is possible to arrive at a reasonable estimate, but an actuarial estimate

[39] Failure of the plan sponsor vigorously to pursue collection efforts subjects the sponsor to liability for fiduciary breach. *See Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 559-60 (1985). If it appears that a plan has been genuinely harmed by a delay in receiving payments of withdrawal liability, it is likely that a cause of action will lie to make the plan whole. If the delay resulted from a lack of diligence by the plan's trustees, the trustees could be held personally liable for the plan's losses. 29 U.S.C. §§ 1104(a), 1109(a), 1132(a)(2). If, on the other hand, one of the plan's service providers was responsible, the plan could pursue remedies for negligence under state law. *See Huber*, 916 F.2d at 88 & n.2.

can be reasonable over a wide range.[40] In addition, the allocation of UVB among the employers is itself somewhat arbitrary. Neither the plan's UVB nor a particular employer's allocable share of UVB is a liquidated amount. Thus, it cannot be said with certainty that, under our reading of the statute, a plan "loses," dollar for dollar, the amount attributable to withdrawal year interest.

Second, actuaries tend to overstate plan liabilities by using conservative actuarial assumptions. For example, this Plan's interest rate assumption in 1981 was only 7 percent even though the Plan earned over 15 percent on its investments for fiscal 1980. *See* J.A. 174. If the plan's UVB is inflated, so is an employer's withdrawal liability. Yet an employer can rarely succeed in challenging the amount, because the actuary's assumptions are presumed correct in aribtration proceedings, and the arbitrator's findings are presumed correct upon judicial review. 29 U.S.C. § 1401(a)(3)(B), (c). Chances are good, then, that an employer pays *more* than its share of UVB even without the addition of withdrawal year interest.

Third, the formula for calculating the annual payment of withdrawal liability is skewed in the plan's favor. The annual payment is based on the average contribution base units for the *highest* three years during the preceding ten years and the *highest* contribution rate. 29 U.S.C. § 1399 (c)(1)(C)(i). Not infrequently, however, an employer's operations would have declined in the years immediately preceding its withdrawal. *McGill & Grubbs* at 630. In

[40] An example from the record highlights this principle. In 1980, the Plan's actuary liberalized the assumptions used to value the Plan—the interest rate assumption was increased from 5 percent to 7 percent, a different mortality table was used, and the retirement age assumption was adjusted to reflect the Plan's actual experience. Schlitz Exh. 58, at 1. According to the actuary, "The net effect of these changes was to reduce the normal cost by $914,077 and the accrued liability by $31,201,734." *Id.* Yet the actuary certified that both sets of assumptions were reasonable in the aggregate and, in combination, represented his "best estimate" of anticipated experience under the Plan. Schlitz Exh. 57, at 4; Schlitz Exh. 58, at 4.

those circumstances, the annual payment of withdrawal liability will *exceed* the amount of the employer's annual contributions in the most recent years prior to its withdrawal. Thus, any gap in funding should be made up in part by the higher level of withdrawal liability payments.

Fourth, the plan is revalued every year, and the minimum funding contribution is determined. To the extent later valuations should show an experience loss after a withdrawal, the amount is amortized over future years and made up in future contributions. *See supra* pages 7-8. Any such loss falls on the employers that continue to contribute to the plan, but it is spread among them and payable over a 15-year period. I.R.C. § 412 (b)(2)(B)(iv). This is not unduly harsh. In any event, any funding deficiency is the responsibility of the remaining employers and does not reduce the level of benefits that will be paid.

In fact, from the plan's perspective, it is probably preferable to increase contributions from continuing employers than to assess withdrawal year interest against a withdrawing employer. Since the withdrawing employer's annual payment is established independently of the amount of the liability, adding withdrawal year interest to the liability will not result in greater amounts being paid to the plan sooner. Rather, the effect will be to lengthen the payment schedule by adding payments at the end of the schedule. By contrast, the plan would benefit from increased contributions from contributing employers as soon as the increase took effect.

Thus, it is doubtful that the inability to assess interest for the year before payments begin causes any real "gap" in plan funding. Certainly, the statute is "fair" to plans on balance.

C. The Statute Rationally Sacrifices Some Precision to Enhance Efficiency

Petitioner asserts that unless withdrawal year interest is charged a withdrawing employer will not pay its full allocable share of UVB. Pet. Br. at 37. To the extent

that is true, it was a deliberate choice that Congress made in order to streamline the process.

Petitioner is correct that the amount of a plan's UVB at the time an employer withdraws will not be the same as it was on the valuation date—the last day of the preceding plan year. A plan's UVB changes over time, probably on a daily basis. Benefits are accrued, investment returns are earned, participants are added to and deleted from the plan's rolls. Thus the employer's allocable share of UVB on the date of withdrawal, on the date on which the actual payment schedule begins, and on the date on which the hypothetical payment schedule begins will *all* be different from its share as of the last day of the preceding plan year.

But this is not to say that adding withdrawal year interest will cure the problem; it will not. Updating the valuation by adding interest or adjusting the discount period alone will not render the calculation accurate. A complete revaluation of the plan as of the withdrawal date would be necessary to determine the employer's share of UVB with any reasonable degree of accuracy. And Congress wisely chose to spare plans the burden of completely revaluing the plan each time an employer withdraws.

In fact, such a requirement would have been unworkable. Valuing a pension plan is a complicated, time-consuming, and expensive undertaking. *See* NCCMP Br. at 6-7 & n.5. Had Congress not adopted the rule of thumb that withdrawal liability incurred within a given year is to be computed with reference to a single valuation, a plan's actuary could constantly be performing valuations. Even if there were only one withdrawal a year, inevitably there would be a significant lapse of time between the withdrawal and the commencement of liability payments. The scheme created by Congress, by contrast, permits plans to make demand promptly and begin receiving payments shortly thereafter.

The statute incorporates other simplifying measures. For example, it eliminates the need to make a present value adjustment when converting the annual payment schedule into quarterly payments. 29 U.S.C. § 1399(c)(1)(A)(i); PBGC Opinion No. 85-1. Obviously, the conversion would be more precise if such an adjustment were made to reflect the time value of money. But Congress apparently opted for simplicity rather than precision in this instance as well.

Moreover, employers generally are not required to pay their allocable share of UVB if the amount is *de minimis*. 29 U.S.C. § 1389(a). This spares plans the expense of administering a collection process that will produce an insubstantial benefit for the plan. *See* H.R. Rep. No. 869, pt. 1, at 76. And no employer is required to pay withdrawal liability for more than 20 years, which also reduces the record-keeping burden on the plan, in addition to providing relief to the withdrawing employer.

In summary, Congress reasonably decided to incorporate some simple rules of thumb into an otherwise complex statute. There is no reason for the Court to seek to improve upon Congress's handiwork by providing for the accrual of withdrawal year interest.

D. The Court Should Not Resolve Doubts Against Withdrawing Employers

The Plan urges the Court, in the event the language of the statute "leaves any doubt" on the issue presented, to construe the statute in its favor pursuant to "the clear purpose of ERISA and MPPAA." Pet. Br. at 31, 32. As explained in section II.A. above, this mode of analysis is flawed in any setting. It is particularly inappropriate here.

The Court should be chary about construing this statute against withdrawing employers. MPPAA has provoked serious constitutional challenges since its enactment because of its harsh treatment of withdrawing employers. In fact, for several years, parts of the statute were deemed unconstitutional within the Third Circuit under *Yahn &*

McDonnell.[41] This Court rescued those parts of the statute in *Concrete Pipe*, but only by means of a "hoary" rule of statutory construction—that in cases of ambiguity the Court will construe a statute to avoid constitutional problems. 113 S. Ct. at 2282-83. With the scales so sharply tilted against withdrawing employers like Schlitz, the judicial thumb of statutory construction should rest, if anywhere, on their side.

In ERISA, Congress apparently decided that multiemployer pension plans should be classified as defined benefit plans and subject to extensive regulation as such. This was a significant change, as at least one participant in the process recognized:

> [W]e have taken something that neither looked like a duck, or walked like a duck, or quacked like a duck, and we passed a law [ERISA] and said, "It is a duck." . . .
>
> It is treating the multiemployer plans where you negotiate a contribution as having put a legal obligation on the employer to reach a level of benefits that has caused the problem.

Education & Labor Hearings, App. B n.3, at 391 (statement of Rep. Erlenborn). Employers were made liable not just for the contributions that they agreed to make in collective bargaining but also for any excess over that amount needed to satisfy ERISA's minimum funding rules. These plans were also subjected to ERISA's termination insurance provisions, which as originally drafted would have made an employer liable for part of the plan's underfunding if the plan terminated within five years of the employer's withdrawal.

Faced with these changes in the basic rules, it is not surprising that employers would withdraw from multiemployer plans in droves. *See generally* Wayne Jett, *The Path to Destruction of Taft-Hartley Pension Trusts: Man-*

[41] *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 138-42 (3d Cir. 1986), *aff'd by an equally divided Court sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

datory "Defined Benefit Plan" Status, reprinted in Education & Labor Hearings, App. B n.3, at 1134. Such conduct, in turn, would seriously affect the financial stability of those plans. MPPAA was designed in part to stop the potential exodus from multiemployer plans by holding employers liable for the underfunding of vested benefits even upon withdrawal.

Not only did MPPAA impose a substantial new liability, but it did so retroactively. As enacted in September 1980, the statute imposed withdrawal liability on employers that had withdrawn as early as April 1980. *See* Pub. L. No. 96-364, § 108(c)(1), 94 Stat. 1267 (1980).[42] In addition, for those employers that had contributed to the plan before the April effective date, liability included a share of the plan's UVB that had accumulated prior to the effective date. Pub. L. No. 96-364, § 103, 94 Stat. 1216, 1227.

MPPAA's liability assessment and collection procedures are also tilted against the withdrawing employer. As explained above, the amount of the liability is based on the plan's UVB. The UVB, in turn, is calculated by applying a set of actuarial assumptions to the available data. Actuaries have a professional responsibility to ensure adequate plan funding and tend to use conservative assumptions. *Vinson & Elkins*, 99 T.C. at 26-27. Actuaries are hired by the plan sponsor, which has a fiduciary duty to protect the interests of the plan's participants and beneficiaries. *See generally Concrete Pipe*, 113 S. Ct. at 2276; *Connolly*, 475 U.S. at 233-34 (O'Connor, J., concurring). With these forces at work, it is likely that a plan's UVB will be overstated to some extent.

To be sure, a withdrawing employer has the right to challenge the amount of the withdrawal liability as calculated by the plan. But even here, the employer is at a disadvantage. The employer must make payments in ac-

[42] This feature of the statute was upheld against a constitutional challenge in *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In 1984 the statute was amended to eliminate this retroactivity. Pub. L. No. 98-369, § 558, 98 Stat. 899 (1984).

cordance with the plan's payment schedule while its challenge is being resolved; the obligation is not stayed even if the plan's calculation was wrong. 29 U.S.C. § 1399 (c)(2). Disputes are submitted to mandatory arbitration, 29 U.S.C. § 1401(a)(1), and the burden is on the employer to prove both that the factual determinations of the plan sponsor were erroneous and that the actuarial assumptions and methods were unreasonable. 29 U.S.C. § 1401(a)(3). Although these provisions pass constitutional muster under *Concrete Pipe*, it is nevertheless unusual for the burden of proof to be placed on the debtor instead of on the claimant.

The arbitrator's award is subject to review in the courts. 29 U.S.C. § 1401(b)(2). Again, however, the employer bears a difficult burden. In any such judicial proceeding, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401 (c). The reasonableness of actuarial assumptions is a question of fact. *Vinson & Elkins*, 7 F.3d at 1237. It will be the rare case indeed in which an employer succeeds in challenging the plan's UVB calculation.

Under these circumstances, the courts should be hesitant to impose financial obligations on withdrawing employers unless the statute clearly requires them. If the statute is silent, the courts should not impose liability.

CONCLUSION

For the reasons stated herein, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

PBGC Bill (H.R. 3904)
as Amended in Initial Markup [*]

"SEC. 4201. (a)(1) Except as provided in subsection [(e)](*d*), an employer that withdraws from a multiemployer plan is liable to the plan for the amount determined under subsection [(d)] (*e*), (*f*), *or* (*g*), *whichever is applicable*, and shall pay the liability[, plus interest,] in accordance with subsection [(e)](*i*).

Pub. L. No. 96-364

"Sec. 4201. (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

"(b) For purposes of subsection (a)—

"(1) The withdrawal liability of an employer to a plan is the amount determined under section 4211 to be the allocable amount of unfunded vested benefits, adjusted—

"(A) first, by any de minimis reduction applicable under section 4209,

"(B) next, in the case of a partial withdrawal, in accordance with section 4206,

"(C) then, to the extent necessary to reflect the limitation on annual payments under section 4219(c)(1)(B), and

"(D) finally, in accordance with section 4225."

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[*] The original bill is set in regular type. Bracketed language was deleted in the markup; italicized language was added. The comparable provisions of the bill as enacted are set in boldface.

Sec. 4201. "[(e)(1)] (*i*)(*1*) As soon as practicable after an employer withdrawal *or partial withdrawal,* the plan [administrator] *sponsor* shall notify the employer of the amount of the liability and the schedule of liability payments, determined under this subsection, and shall, consistent with subsection [(f)] (*j*), demand payment in accordance with the schedule."

Sec. 4219. (b). "(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule."

"(2)(*A*) Except as provided in *paragraph 2(C) and in* paragraphs (6) and (7), an employer shall pay the liability determined under subsection [(d)] (*e*), (*f*), *or* (*g*), *whichever is applicable,* over [a] *the* [period of years in annual amounts, including accrued interest on the outstanding principal, equal to the greater of—]

["(A) the average of the employer's required annual contributions under the plan for the 3 plan years preceeding the date of the withdrawal, or]

["(B) the amount necessary to amortize the employer's liability (plus accrued interest) in equal annual installments over a period of 15 years, until fully amortized.] *lesser of—*

"(i) 30 years, or

"(ii) the period of years necessary to amortize the liability in level annual payments, determined under paragraph (B) as if each payment were made at the end of the year in which it is due.

The determinaiton of the amortization period shall be based on the assumptions used for the most recent actuarial valuation for the plan.

"(B) The amount of each annual payment shall be the product of—

"(i) the average number of contribution base units for the 3 years during the 10 plan years ending with the year of withdrawal in which the number of contribution base units for which the employer had an obligation to make contributions under the plan is the highest, and

"(ii) the highest contribution rate which the employer had an obligation to contribute under the plan in effect during the 10 plan years ending with the year of withdrawal."

"(c)(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraph (4) and (5), an employer shall pay the amount determined under section 4211, adjusted if appropriate first under section 4209 and then under section 4206 over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

"(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation of the plan.

"(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

"(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

"(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

"(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs."

"[(4)] (3) Withdrawal liability [(plus accrued interest)] shall be payable in accordance with the schedule set forth by the plan [administrator] *sponsor* under paragraph (1), beginning no later than 60 days after the date of the demand."

"(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule."

"[(3)] *(4)* Each amount determined under paragraph (2) shall be payable in four equal installments due quarterly, or at other intervals specified by plan rules. *If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.*"

"(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made."

"(6) The employer shall be entitled to prepay the outstanding amount of its withdrawal liability, plus accrued interest, *if any*, in whole or in part, without penalty."

"(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. * * *"

"(7) A plan [administrator] *sponsor* may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest *on the total outstanding liability from the due date of the first payment that was not timely made*, in the event of a default. For purposes of this section, 'default' means—

"(A) the failure of an employer to make, when due, any payment under this subsection, if the failure is not cured within 60 days after the employer receives written notification from the plan [administrator] *sponsor* of the failure, and

"(B) any other event defined in rules adopted by a plan that indicates a reasonable likelihood that an employer will be unable to pay its withdrawal liability."

"(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term 'default' means—

"(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

"(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability."

"(5) Interest under this subsection shall be charged [from the date of the withdrawal] at rates based on prevailing market rates for comparable obligations, in accordance with regulations of the corporation."

"(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation."

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1/ 125 Cong. Rec. 9,702 (1979); see also id. at 9,643.

2/ 125 Cong. Rec. 9,783 (1979); see also id. at 9,800-22.

3/ Hearings on the Multiemployer Pension Plan Amendments Act of 1979 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. (1979).

[6] Multiemployer Pension Plan Termination Insurance Program, Hearing before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979).

[7] The Multiemployer Pension Plan Amendments Act of 1979, Hearing Before the House Comm. on Ways and Means, 96th Cong., 2d Sess. (1980). Starting at page 3, this volume reproduces Staff of the Joint Comm. on Taxation, 2d Sess., Description of H.R. 3904 (As reported by the Comm. on Education and Labor) Relating to Multiemployer Pension Plan Amendments Prepared for Use of the House Comm. on Ways and Means (Jt. Comm. Print 1980).

[8] Multiemployer Pension Plan Amendments Act of 1979, Hearings Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979).

[9] Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance, 96th Cong., 2d Sess. (1980).

[9] Amendment in the nature of a substitute for H.R. 3904, as reported by Subcommittee on Labor-Management Relations of the House Committee on Education and Labor on Dec. 13, 1979, reproduced in Education & Labor Hearings, supra note 3, at 114 ff.

[9] H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 2918. See 126 Cong. Rec. 7,489 (1980).

[10] H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2 (1980), reprinted in 1980 U.S.C.C.A.N. 2993. See 126 Cong. Rec. 8,864 (1980).

[11] Reported jointly by both committees, with no written report. See 126 Cong. Rec. 19,598-601 (1980). See also 126 Cong. Rec. 20,189 ff. (1980) ("Joint Explanation of S. 1076").

[12] 126 Cong. Rec. 11,990-98, 12,176-234 (1980).

[13] 126 Cong. Rec. 20,148-277 (1980). H.R. 3904 was passed after being amended to substitute the language of S. 1076 as amended.

[14] 126 Cong. Rec. 23,003-50 (1980). The House agreed to Senate amendments to H.R. 3904, with further amendments.

[15] 126 Cong. Rec. 23,280-91 (1980). The Senate agreed to the House Amendments to the Senate Amendments to H.R. 3904, with further amendments.

[16] 126 Cong. Rec. 23,645-47 (1980).

[17] 126 Cong. Rec. 24,541 (1980).

[18] H.R. Conf. Rep. No. 1343, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 3066. See 126 Cong. Rec. 26,361 (1980).

[19] 126 Cong. Rec. 26,361-42 (1980).

[20] 126 Cong. Rec. 26,040-41 (1980).

[21] Pub. L. No. 96-364, 94 Stat. 1208 (1980).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

Petitioner, Milwaukee Brewery Workers' Pension Plan ("Plan"), respectfully submits this Reply Brief responding to the arguments made in Brief For Respondents.

ARGUMENT

The Plan's argument, based upon the plain language of Section 4219(c) of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), can be succinctly summarized as follows:

1. After the plan has determined the total amount of unfunded vested benefits allocated to a withdrawing employer, made any permitted adjustments to that amount and calculated the maximum annual payments which can be assessed, Section 4219(c)(1)(A)(i) of MPPAA clearly, unambiguously and explicitly instructs multiemployer plans to create a hypothetical or presumed payment schedule in order to determine the period of years over which a withdrawing employer is required to make level annual payments to the plan. 29 U.S.C. § 1399(c)(1)(A)(i);

2. In Section 4219(c)(1)(A)(i), Congress made it clear that this presumed payment schedule is separate from and does not depend upon when the employer is actually required to make payments to the plan;

3. In Section 4219(c)(1)(A)(i), Congress explicitly instructed that the withdrawing employer is required to make annual payments over the period of years necessary to **amortize** the amount of the unfunded, vested benefits allocated to the withdrawing employer according to the presumed payment schedule;

4. As Respondents concede "it is customary (if not mandatory) for an amortization calculation to include an interest component." Brief of Respondent at 20;

5. As Respondents also concede, Sections 4219(c)(1)(A)(i), 4219(c)(1)(A)(ii) and 4219(c)(1)(A)(6), when read together indicate that payments in the presumed payment schedule should reflect a factor for interest. Brief of Respondent at 20; 29 U.S.C. § 1399 (c)(1)(A)(i), (c)(1)(A)(ii) and (c)(1)(A)(6);

6. Congress did not distinguish the first payment in the presumed payment schedule from all other payments in the schedule. Accordingly, Congress did not exclude the interest factor or component from the first presumed payment;

7. In Section 4219(c)(1)(A)(i), Congress directs plans to construct a presumed payment schedule in which each annual payment, including the first payment, includes one year of accrued interest at the rates used for the most recent actuarial valuation for the plan.

8. Although actual payments are not made according to the presumed payment schedule, the withdrawing employer is required to make the number of annual payments reflected in the presumed payment schedule.

The presumed payment schedule in this case, constructed according to Congress' instructions in Section 4219(c)(1)(A)(i), is set forth at pages 28-29 of Brief For Petitioner. The Plan's reading of Section 4219(c)(1)(A)(i) is consistent with the structure, design and primary purpose of The Employee Retirement Income Security Act ("ERISA") and MPPAA. The Plan's reading of Section 4219(c)(1)(A)(i) is also consistent with the minimal legislative history which provides any genuine insight into Congress' intent on the issue.

In Respondents' Counter Statement of The Case, they accuse the Plan and the amici of submitting summaries of the statutory scheme which are unduly narrow and fail to explain the broader context in which withdrawal liability provisions operate. Brief For Respondents at 3. This observation telegraphs the weakness in Respondents' arguments. Although important and in need of resolution, the issue in this case is narrow, straightforward and can be resolved solely by reference to the clear language of the statute. The Respondents make numerous arguments and observations in an effort to distract the Court from the plain language

Congress used in Section 4219(c)(1)(A)(i) of MPPAA.[1] Although most of these arguments are not even on point, the Plan will attempt to briefly address each.

Before addressing the arguments made by Respondents, it is important to dispel two impressions Respondents apparently seek to create. First, despite having never missed a scheduled payment, Respondents concede that MPPAA required them to pay an amount in excess of the amount of unfunded benefits allocated to Schlitz and in excess of Schlitz' "withdrawal liability." While disputing the rulings made by the arbitrator, the parties agreed that those rulings reduced the amount of unfunded, vested benefits allocated to Schlitz to $23,300,000. (Brief For Petitioner at 19). In this case, pursuant to the arbitrator's rulings, Schlitz' "withdrawal liability," as that term is defined in MPPAA, was also $23,300,000. (Brief for Respondents at 21). However, Respondents have not paid the Plan only $23,300,000. Rather, as set forth in the schedule found in the Appendix to Petition for Certiorari at F-5, since Schlitz withdrew, Respondents have paid a total of $28,498,691 to the Plan.

Respondents were required to pay this amount because it is the total of the annual payments in a presumed payment schedule. The amount paid by Respondents to date is the

[1] The Respondents identify eight steps which they describe as used to calculate the amount of an employer's withdrawal liability. Brief For Respondents at 11-15. The Plan agrees generally that these eight steps, not necessarily in the order articulated by the Respondents, will provide the answer to the question how much is a withdrawing employer required to pay to the plan. These eight steps do not determine an employer's "withdrawal liability" as defined in MPPAA. It is interesting to note that the dispute in this case centers on the "amortization period" described in step number 5. Respondents make virtually no effort to describe how that period is determined.

total of all annual payments in a presumed payment schedule in which the first presumed payment was attributed entirely to reduce the amount of unfunded vested benefits allocated to Schlitz, and all remaining annual payments were attributed in part to reduce that amount and in part to the one year's worth of interest accrued on the remaining amount at a 7% annual rate. The dispute in this case is whether the first presumed payment in the schedule should have been attributed in part to one years worth of accrued interest at the 7% annual rate. If, as the Plan asserts, the first presumed payment should have also been attributed in part to interest, then Respondents should have made additional payments totaling $2,619,041 or total payments of $31,117,732 . Thus, the Court should disregard any suggestion that MPPAA does not require withdrawing employers, who make timely payments, to pay more than the amount of unfunded vested benefits allocated to the employer or more than the employer's "withdrawal liability".

In addition, perhaps in a commendable effort to find a shorthand word or phrase which describes a more complex concept, the parties and several Courts have used the word "interest" to describe the amount paid by the Respondents in excess of Schlitz' allocated share of the unfunded benefits or "withdrawal liability." This description reflects one of the reasons Congress may have required a withdrawing employer to pay amounts in addition to the employer's withdrawal liability. However, Congress did not describe the additional amount as interest. While convenient, characterizing the amount as interest is not precise and triggers several arguments from Respondents which do not focus on

the plain language of Section 4219(c)(1)(A)(i).[2] This Court is not required to characterize the required payments that are in excess of the amount of allocated unfunded vested benefits. The Court must only determine whether Congress clearly and unequivocally provided that an employer must make those additional payments.

I.

THE PLAIN LANGUAGE OF SECTION 4219(c)(1)(A)(i) REQUIRED RESPONDENTS TO MAKE ADDITIONAL PAYMENTS IN ORDER TO AMORTIZE FULLY THE AMOUNT OF UNFUNDED, VESTED BENEFITS ALLOCATED TO SCHLITZ.

Congress requires withdrawing employers to make sufficient level annual payments to **amortize** the amount of unfunded, vested benefits allocated to that employer. Congress instructs plans to construct a presumed payment schedule in order to determine how many annual payments a withdrawing employer must make. Because Congress did not distinguish the first payment in the presumed schedule from all other payments, all presumed payments must include an interest component. Because the arbitrator and the Seventh Circuit erroneously excluded the interest component from the first presumed payment, Respondents have not made sufficient payments to the Plan.

Respondents initially argue that the first payment in the presumed payment schedule should not include an interest component because Congress did not require a withdrawing employer to pay interest for the year of withdrawal. Next

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[2] Amicus Curiae, Central States, Southeast and Southwest Areas Pension Fund ("Central States") describes the amount as a necessary adjustment to correct an excessive discount. Brief of Central States at 11. Once again, the description is an effort to describe the reason for the additional payments.

Respondents argue that because the term **"amortize"** does not direct when interest is to begin, Congress could not have intended for the first payment in the presumed schedule to include an interest component. Finally, Respondents argue that the result urged by the Plan would be illogical and inconsistent with other provisions in MPPAA. Brief For Respondents at 18-27. These arguments have no merit.

A. That Congress Did Not Expressly Provide For The Payment Of Interest During The Withdrawal Year Does Not Establish That An Interest Factor Is Not Included In The First Payment In The Presumed Payment Schedule.

Respondents emphasize that in MPPAA, Congress specifically imposed interest on withdrawing employers in two instances; if a scheduled payment is late or if the employer defaults. Brief For Respondents at 18-19; 29 U.S.C. § 1399(c)(3); 29 U.S.C. § 1399(A)(5). Respondents suggest that Congress knew how to provide for accrual of interest but choose to only impose interest in the event that a required payment is not made according to the actual payment schedule. Thus, Respondents argue, because Congress did not specifically require payment of interest in the year of withdrawal, the statute does not explicitly authorize assessment of interest in that period. This argument completely misses the issue.

Section 4219(c)(1)(A)(i) contains two sentences. One long complex detailed sentence instructing plans how to construct a presumed payment schedule that is used to determine the number of level annual payments the withdrawing employer must make to the plan. This sentence is followed immediately by a short simple sentence explicitly recognizing that this presumed schedule is separate from and not dependent upon the actual payment schedule. Accordingly,

it should not be surprising that, although Congress provided for the payment of interest at the prevailing market rate on past due payments under the actual payment schedule, Congress did not utilize similar language to include an interest component in the payments reflected on the presumed payment schedule.

The withdrawing employer never makes any payments according to the presumed schedule. Therefore, it would have been inaccurate and inappropriate for Congress to explicitly provide for the payment of interest on or as part of any of those presumed payments. Accordingly, the fact that Congress did not provide for "payment of interest during the withdrawal year" does not address the question of whether the first presumed payment in the schedule used to determine the number of required payments should contain an interest component.

B. By Instructing The Plan To Amortize The Amount Of Unfunded Benefits Allocated To The Withdrawing Employer, Congress Explicitly Included An Interest Component In All Of The Payments In The Presumed Payment Schedule.

Respondents acknowledge that by using the term "amortize" in section 4219(c)(1)(A)(i), Congress intended to include an interest component in the payments reflected on the presumed payment schedule. Brief for Respondents at 20. "Certainly, it is customary (if not mandatory) for an amortization calculation to include an interest component." Brief For Respondents at 20. In fact, Congress clearly provided for interest to be included in the presumed payment schedule based upon assumptions used for the most recent actuarial valuations. 29 U.S.C. §§ 1399(c)(1)(A)(ii) and 1399(c)(6); Brief For Respondents at 20.

Thus, although Congress did not use the word "interest" in Section 4219(c)(1)(A)(i), or require a withdrawing employer to pay interest on the unpaid liability subsequent to the first presumed payment, Respondents acknowledge that the term "amortize" was sufficient to require an interest component in all payments in the presumed schedule after the first payment. It is also undisputed that in this case, each presumed payment after the first must be attributed to one years worth of interest accrued at the rate of 7% annually. Without citation to any language in the statute or rule of statutory construction, Respondents argue that although using the term "amortize" was sufficient to include an interest component in all presumed payments after the first payment, it is not sufficient to include an interest factor in the first presumed payment.

Rather, according to Respondents, Congress must have intended the first presumed payment to be applied fully to reduce the amount of unfunded, vested benefits allocated to the withdrawing employer, and all subsequent presumed payments to be partially attributed to this amount and partially attributed to interest accrued on that amount. Respondents failure to reference any statutory language supporting this distinction requires the Court to reject the argument. Even if, arguendo, the distinction were reasonable, fair or could be supported by some actuarial logic, Congress did not make the distinction urged by Respondents.

Respondents argue that the definitions of "amortize" submitted by the Plan are beside the point because they do not address when interest is to begin. Brief of Respondents at 20. This argument ignores an important part of each definition cited by the Plan. Each definition recognizes that periodic payments, which are part of any amortization schedule, are partial payment of the principal and a partial

payment of accrued interest. These definitions do not provide that only some of the periodic payments are attributable in part to accrued interest or that all but the first payment is applied in part to accrued interest. Thus, when Congress used the unqualified term "amortize" it clearly intended for all payments in the presumed schedule to include partial payment of principal and partial payment of accrued interest.[3]

C. The Definition Of "Withdrawal Liability" Is Not Inconsistent With The Plan's Reading Of Section 4219(c)(1)(A)(i).

Respondents correctly note that MPPAA defines "withdrawal liability." Brief for Respondents at 21; 29 U.S.C. § 1381(b)(1). Respondents assert that the dispute between the parties concerns whether interest for the withdrawal year is to be added to the amount of "withdrawal liability" and amortized by the scheduled payments. Brief for Respondents at 21. The Plan disagrees with this characterization. The issue is whether in Section 4219(c)(1)(A)(i), or anywhere else in MPPAA, Congress distinguished between the first payment in the presumed payment schedule and all other payments in that schedule.

In Section 4219(c)(1)(A)(i), Congress did not direct plans to calculate the period of years necessary to amortize the employer's "withdrawal liability." Rather, Congress requires withdrawing employers to make sufficient annual payments

[3] Moreover, the fact that Congress did not identify a starting point for the interest component or in any other way distinguish the first presumed payment requires the Court to reject the Seventh Circuit's observations that the statute might authorize an interest component for the period between withdrawal and the actual first payment. See, *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1004 (7th Cir. 1993).

to the plan to amortize the amount of unfunded, vested benefits allocated to a withdrawing employer after certain adjustments are made to that amount. 29 U.S.C. § 1399(c)(1)(A)(i). In this particular case, the amount which must be amortized and the amount of "withdrawal liability" are the same. However, that will not always be the case. For example, if the number of annual payments necessary to amortize the amount of unfunded, vested benefits exceeds 20, or if an adjustment under Section 1405 is required, then the amount which is amortized will exceed the employer's "withdrawal liability." Because Congress did not utilize the defined phrase "withdrawal liability" when it instructed plans how to construct the presumed payment schedule, or require the withdrawing employer to pay the amount of its "withdrawal liability" the definition of "withdrawal liability" is not relevant to the issue before the Court.

D. The Plan's Reading Of Section 4219(c)(1)(A)(i) Is Not Illogical Or Inconsistent With Other MPPAA Provisions.

Respondents next argue that it is illogical to assume Congress provided for interest on a liability which had not yet matured. Brief for Respondents at 24-25. This argument conveniently ignores that the presumed payment schedule used to determine the number of required annual payments is constructed without reference to whether the actual payment will be made before or after the first presumed payment. Respondents do not even address the Plan's observation that the liability did not magically appear but rather arises out of pre-existing obligations, and that MPPAA simply dictates a new payment schedule. *See* Brief of Petitioner at 34-35; *Huber v. Casablanca Ind., Inc.*, 916 F.2d 85, 95 (3d Cir. 1990); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 734 (1984).

If Respondents' argument were extended to its logical conclusion, they did not owe the Plan anything until the date of each required actual payment because their obligation to make those payments did not mature until that time. If interest can only accrue after a liability has matured, then Respondents should not have been required to pay any amount in excess of the unfunded, vested benefits allocated to it. In fact Respondents have already paid in excess of $5,000,000 more than Schlitz' "withdrawal liability" despite never missing or being late with a payment.

Respondents also argue that the Plan's reading is not consistent with Section 1399(c)(4), which provides for pre-payment of the outstanding amount of unpaid annual withdrawal liability payments plus accrued interest, if any, without penalty. According to Respondents, this provision is rendered meaningless under the Plan's interpretation because there would always be accrued interest, and therefore, the "if any" language in the pre-payment provision would be superfluous. Brief for Respondents at 25. This argument should be rejected for several reasons. First, Congress did not use the word "interest" to describe the amounts in excess of the allocated unfunded liabilities an employer is required to pay as a result of the presumed payment schedule established by Section 4219(c)(1)(A)(i). On the other hand, as Respondents noted, in at least two sections, Congress did specifically provide for interest to accrue. *See* 29 U.S.C. § 1399(c)(3); 29 U.S.C. § 1399(c)(5). Thus, the reference to accrued interest, if any, in Section 4219(c)(4) applies to any interest accrued on delinquent payments.

Respondents argue that pursuant to Section 4219(c)(4), they could pay the amount of their withdrawal liability on the day the first actual payment is due or the day of the first presumed payment, whichever is later, and thereby

completely satisfy their obligations to the Plan. This case does not involve those facts and, thus, the Court need not interpret Section 4219(c)(4). However, it is clear that Section 4219(c)(4) only allows an employer to pre-pay the total amount of all remaining annual payments included in the presumed payment schedule.[4] The pre-payment does not reduce the number of annual payments which must be made. It merely allows the employer to accelerate payment without additional penalty. Thus, the presumed payment provision is not inconsistent with the Plan's reading of Section 4219(c)(1)(A)(i).[5]

Respondents next argue that Congress could have chosen to start the presumed payment schedule on any day and, therefore, there is no significance to the carefully crafted language that requires the amortization period to be "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year." 29 U.S.C. § 1399(c)(1)(A)(i); Brief For Respondents at 26. Contrary to Respondents' assertions, this language is very

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[4] Respondents note testimony from one of the Plan's experts, Mr. Levy, which the Respondents assert establishes that MPPAA permits the withdrawing employer to pay in full the amount of its "withdrawal liability" in a lump sum payment on the date that the first actual payment is due. Brief For Respondents at 26. The cited testimony is not as clear as Respondents assert. Even if Mr. Levy's testimony were clear, the questions about whether MPPAA permits pre-payment of only the amount of "withdrawal liability" or requires payment of the total of all annual payments reflected on the presumed payment schedule is a question of law.

[5] Respondents correctly noted that the Court in *Huber* provided yet another meaning for the "if any" qualification in the pre-payment provision. 916 F.2d at 99. Brief For Respondents at 25 n. 27. Contrary to Respondents' assertion this interpretation is not artificial or strained.

significant in the statutory scheme. It is significant not only because it identifies the date of the first presumed payment, but it also sets the date for all subsequent presumed payments. This language directs plans to establish a presumed schedule with one year periods between the date used to calculate the amount of unfunded benefits allocated to the withdrawing employer and the date of the presumed first payment, and similar one year periods between the first presumed payment and every other payment. Equal payment periods is consistent with the requirement that the schedule reflect level annual payments. 29 U.S.C. § 1399(c)(1)(A)(i).

According to Respondents, the amortization period in this case began on November 1, 1981, the date the first actual payment was due. Brief for Respondents at 27. This argument ignores that Congress made it clear the "amortization period" is based upon the presumed schedule not the actual payment schedule. Moreover, if as Respondents assert the amortization period began on November 1, 1981, then the first period between payments in the presumed schedule would be either two months, until January 1, 1982 or fourteen months, until January 1, 1983. In either case, the period between payments is not consistent, and an amortization schedule with level annual payments cannot be easily constructed. Thus, only the Plan's reading of Section 4219(c)(1)(A)(i) gives meaning to every clause in the statute. *See* Brief For Petitioner at 37-39.

II.

THE LEGISLATIVE HISTORIES OF ERISA AND MPPAA IN GENERAL AND SECTION 4219(C)(1)(A)(i) IN PARTICULAR CONFIRM THAT INTEREST ON THE AMOUNT OF UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ ACCRUES FROM THE DATE USED TO DETERMINE THE AMOUNT.

Initially, because there is no ambiguity in Section 4219(c)(1)(A)(i), there is no need to resort to legislative history. *Toibb v. Radloff*, 111 S.Ct. 2197, 2200 (1991). Respondents go to great lengths to find support in various comments for a general proposition that some sections of MPPAA actually benefit the withdrawing employer. Brief for Respondents at 27-37. None of these comments or testimony relates to the intent of Congress on the issue before the Court. From these isolated statements of individual senators, Respondents construct an argument that, even if one purpose for MPPAA is to protect the plan and remaining employers, it is not necessary to assume that every provision furthers that purpose.

It is not necessary to again repeat the observations of this Court regarding the legislative history and purpose of ERISA and MPPAA. See *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 721 (1984); *Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 569 (1985); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 212 (1986); *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2271 (1993). Congress made a specific finding that withdrawals of contributing employers from multiemployer pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plans. 29 U.S.C. § 1001 a(a)(4)(A). Congress made no similar finding relating to the

impact of withdrawal liability on the withdrawing employer. Congress specifically declared it to be among the policies of MPPAA to provide reasonable protections for the interests of participants and beneficiaries of financially distressed multiemployer pension plans. 29 U.S.C. § 1001 a(c)(3) and (4). Congress did not declare it to be the policy of MPPAA to protect withdrawing employers.

As this Court has noted, MPPAA was not designed to protect withdrawing employers but, rather, to protect the plan and those employers which continue to participate in the plan. *Laborers Health and Welfare Trust Fund for Northern Cal. v. Advance Lightweight Concrete Co., Inc.*, 484 U.S. 539, 545 (1988). Where, as in this case, there is a clear, primary purpose for a statute and no legislative history indicating that a specific portion of the statute should be construed contrary to the stated findings and purpose of the legislation, it would be inappropriate to assume Congress intended for a particular provision to be a counter-balance to the primary purpose.

Respondents conclude that the absence of any clear legislative history confirming that Congress intended to include an interest component in the first presumed payment, requires this Court to find Congress did not intend to include that component. The Plan maintains that because there is no indication in the plain language of MPPAA that Congress intended to distinguish between the first presumed payment and all other payments, because there is no specific legislative history establishing that the first payment should not include an interest factor and because the overall intent of MPPAA is to protect the plan and remaining employers, the Respondents arguments should be rejected. See *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (absent a clearly

expressed legislative intention to the contrary, language of statute is regarded as conclusive).

Respondents also argue that the Plan misreads the legislative history. The Plan noted that an example calculation of withdrawal liability which is contained in several committee reports is consistent with the Plan's reading of the statute. Brief for Petitioner at 40 n. 22. Respondents argue that this calculation at one point was correct and then became inaccurate because of a significant change in the draft legislation. Respondents suggestion that the committees reporting the bill made a significant change in the language of the bill but forgot to change the example demonstrating how the bill would apply is simply not credible.

III.

EQUITY DOES NOT FAVOR RESPONDENTS.

In what can only be described as an unusual reversal of typical roles, this Plan, with enormous funding issues affecting its participants, long-time brewery workers and their families, has based its argument primarily on the cold, clear language of MPPAA. Respondents undertake substantial efforts to argue that the straightforward reading urged by the Plan is not fair to employers. Brief for Respondent at 40-50. The Plan submits that Congress has already resolved any equitable considerations. This Court need not engage in such analysis. However, if Respondents want to raise the issue, the Record in this case speaks volumes about equity.

The direct attribution method for allocating unfunded vested benefits, attempts to match unfunded, vested benefits with the employer that received the hours of service from the employee earning the benefits Schlitz' allocated

share of unfunded benefits calculated under that method was $41,031,406. Because the direct attribution method was not in its best interest, Schlitz did not participate in a decision to amend the Plan, to select that method for calculating withdrawal liability. The lower Courts held that in the absence of a valid plan amendment, the presumptive method should have been utilized. Concluding that the selection of the methods for calculating withdrawal liability is not a fiduciary function, the Seventh Circuit endorsed Schlitz' conduct. Thus, Schlitz was able to escape lability for almost $20,000,000 in unfunded benefits earned by its former employees. The additional burden for this liability shifts to the remaining employers, potentially to the Pension Benefit Guaranty Corporation and, ultimately, to the Plan's participants and beneficiaries. This liability is for benefits which Schlitz promised, which were earned by Schlitz employees while working for Schlitz' benefit, but will not be paid for by Schlitz.

Now Schlitz speculates that any additional gap in funding caused by its interpretation of Section 4219(c)(1)(A)(i) would likely be small, and that other provisions in MPPAA which favor the Plan more than offset any funding deficiencies caused by a gap. Schlitz asserts that all actuaries overstate future liabilities and use conservative assumptions. Moreover, according to Respondents, any funding problems can be corrected overtime by increases in contributions from continuing employers. MPPAA provides one significant benefit to employers. Once they have paid the total of all annual payments in the presumed payment schedule, they no longer have any obligations to the Plan. They cannot be responsible for unanticipated events or mistakes in actuarial assumptions. The Plan has only one opportunity to calculate, according to MPPAA, a withdrawing employers fair share of liability for unfunded vested benefits. If there is any doubt about Congress' intent on the issue before the

Court, consistent with MPPAA's purpose, that doubt should be resolved in favor of the Plan not the Respondents.

CONCLUSION

The plain language of Section 4219(c)(1)(A)(i) resolves the issue in this case. All arguments which do not focus or rely on that language are red herrings. The Plan requests that the Court vacate the judgment of the Seventh Circuit on this issue and remand the case to the Seventh Circuit with instructions that it remand the case to the District Court for the purpose of calculating Schlitz' total additional liability as of that date, including pre-judgment and post-judgment interest as previously awarded by the District Court, and entering judgment in favor of the Plan in that amount.

Respectfully submitted,

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No. 93-768

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE CENTRAL STATES PENSION FUND

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947. Central States is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the Trustees

owe an undivided duty of loyalty. The purpose of the Central States pension plan is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the plan.

Under the plan participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. The plan covers 164,000 retirees currently drawing benefits and 238,000 active participants. During 1993 Central States paid $1.2 billion in pension benefits and $14.1 billion since its creation. Central States presently receives contributions from over 5,000 employers through 9,164 billing accounts from 42 states and Canada.[1]

Additional funding is required by statute when an employer withdraws (ceases to have an obligation to contribute) from Central States. This withdrawal liability is an employer's pro-rata share of the unfunded vested liabilities of the plan. As of June 30, 1994, Central States had 273 outstanding assessments of withdrawal liability totalling approximately $276 million. Since September 26, 1980,[2] Central States has assessed 1,553 withdrawn employers for $1,138 million and has collected about $386 million in withdrawal liability.

In the decision below the United States Court of Appeals for the Seventh Circuit ruled that in calculating and collecting withdrawal liability Petitioner, a multiemployer pension plan like Central States, may not apply an amortization charge (interest) to the first annual billing cycle. *Schlitz v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993), *petition for cert. granted*, No. 93-768 (Jun. 27, 1994). This decision is directly in conflict with an earlier decision of the Third Circuit in *Huber v. Casablanca Industries*, 916 F.2d 85 (3rd Cir. 1990), *cert. dismissed*, —— U.S. ——, 113 S.Ct. 1070 (1993). The Fourth Circuit has also ruled in conflict with the Third Circuit on this question in *Borden v. Bakery & Confectionery Union Pension Fund*, 974 F.2d 528 (4th Cir. 1992). The Fourth and Seventh Circuits are not aligned, however, as we explain *infra*.

[1] A billing account is generally assigned to each collective bargaining agreement. Some employers are subject to more than one agreement.

[2] This is the effective date of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which added the withdrawal liability provisions to the Employee Retirement Income Security Act of 1974 ("ERISA").

This conflict among the circuits creates a problem of immense proportions for multiemployer plans like Central States that cover more than one federal judicial circuit, and have many contributing employers whose broad operations give them a choice of venue. There are three, incompatible ways to calculate withdrawal liability. Put another way, every withdrawal liability assessment is wrong somewhere.

Central States files this brief in support of Petitioner. Central States and Petitioner are both multiemployer plans that, under MPPAA, must collect withdrawal liability. Due to its size, however, Central States brings a somewhat broader perspective to the question presented. To Central States it is more than a question of collecting interest from an employer. The conflict in the circuits impairs the administration of the program and leads to uncertainty and, inevitably, litigation at great cost to the Fund, its participants and beneficiaries, and contributing employers. Central States files this brief to present its view of the statute based on its broader withdrawal liability program and to offer two arguments not presented by Petitioners.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Seventh Circuit ruled below that a multiemployer pension plan may not charge interest on a withdrawn employer's withdrawal liability assessment for the period after the statutory calculation date but before the employer's withdrawal date ("pre-withdrawal interest").[3] The Seventh Circuit misapprehended, however, the nature of this charge. It is not actually an interest charge, but rather is a simple mathematical adjustment to a present value discount calculation.[4] And if the charge is not interest, then the basis for the ruling of the court below is lost and its decision must fall.

The Seventh Circuit also stated (but did not rule) that "[a]n assessment of interest between the date of withdrawal and the date on which payments begin . . . would not be troubling." *Schlitz* at 1004. This is not consistent with the Fourth Circuit, which held that a plan may assess no interest until the first payment is due. We argue first that both circuits are wrong. But if this Court should rule that the Seventh Circuit is correct that pre-withdrawal interest may not be charged, then the Court should further determine whether the Seventh Circuit or the Fourth Circuit is correct on whether a plan may assess interest

[3] Another Court of Appeals, the Fourth Circuit, had earlier ruled that no interest could be charged for the period between the calculation date and the first payment date ("pre-payment interest"). *Borden v. Bakery & Confectionery Pension*, 974 F.2d 528 (4th Cir. 1992). The Third Circuit had ruled that the statute required a one-year interest charge for this period ("first year" or "gap year" interest). *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990). This Court granted certiorari on June 27, 1994 to resolve this conflict. For purposes of this first argument, the Seventh and Fourth Circuit rulings stand or fall together.

[4] The Seventh Circuit followed the parties' convention of referring to this charge as interest (as did the Third and Fourth Circuits in their cases). This shorthand for the mathematical process under the statute may be convenient, but it is not precise, as we show below.

for the post-withdrawal, pre-demand period.[5] As we show, the Seventh Circuit has the better position. If this Court affirms the court below, it should clarify that interest accrues from an employer's date of withdrawal.

ARGUMENT

I. STATUTORY BACKGROUND; EXAMPLE

A withdrawal from a multiemployer pension plan occurs when a contributing employer permanently ceases to have an obligation to contribute or permanently ceases covered operations. 29 U.S.C. § 1383(a). This may occur, for example, because of the expiration of a collective bargaining agreement (under which contributions were owed) or because the company went out of business. When a withdrawal occurs the obligation of the employer to the plan does not necessarily end. If the plan has unfunded vested benefits, then the employer may owe withdrawal liability. 29 U.S.C. § 1381(a). The liability is payable over time (up to 20 years). 29 U.S.C. § 1399(c)(1).[6] The dispute here involves the calculation of a withdrawn employer's withdrawal liability and, in particular, the determination of the beginning balance due under the payment schedule.

It is fair to simplify this process with an example for purposes of this discussion. Say an employer withdraws

[5] For purposes of this alternative argument the Seventh and Fourth Circuit positions stand apart. A failure to resolve the conflict between these positions would leave plans (and employers) guessing as to every withdrawal liability calculation. The split between these circuits is as serious as their split with the Third Circuit and must be resolved for all the reasons stated in the Petition for Certiorari and supporting briefs of *amici* Central States and the United States.

[6] The Court has recently covered this ground in *Concrete Pipe & Products v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264 (1994). *See also Connolly v. PBGC*, 475 U.S. 211, 106 S.Ct. 1018 (1986); *PBGC v. R.A. Gray*, 467 U.S. 717, 104 S.Ct. 2709 (1984).

from Central States on July 1, 1994. The employer has been paying Central States a contribution of $50 per week for each of 20 employees under the terms of its collective bargaining agreement and the pension plan. This is a total of $1,000 per week or $52,000 per year for this employer.

To calculate the employer's withdrawal liability, Central States must first know the amount of unfunded vested benefits (UVB) under the plan. This is the difference between the value of assets and the value of vested benefits. 29 U.S.C. § 1393. This amount is determined by Central States' actuary as part of the actuarial valuation that ERISA requires for purposes of a plan's annual report. 29 U.S.C. § 1023(a)(1)(A). Central States' last actuarial valuation shows that as of December 31, 1993, Central States had UVB of $2.195 billion (the difference between assets of $12.332 billion and vested benefit liabilities of $14.527 billion).

The withdrawn employer's share of this UVB is based on the ratio of its own contributions to the contributions of all employers under the plan. In Central States' case this ratio encompasses a ten-year period (*see* 29 U.S.C. § 1391(c)(5)(C)), so in our example the employer's contributions for ten years of $520,000 are divided by total contributions for that period of $6.366 billion—to produce a share of .0082%. Under this calculation the employer's share of UVB would be $180,000.

The next step is to determine the amount of the employer's annual payment. In our example this is easy because we have assumed level contributions. The statutory formula requires that an annual average of contribution base units (weeks worked) be multiplied by the highest contribution rate. 29 U.S.C. § 1399(c)(1)(C). Twenty employees, times 52 weeks worked, times $50 per week, equals $52,000 per year—the same as the pre-withdrawal contribution level.

Finally the statute requires that the plan determine a payment schedule "necessary to amortize the [withdrawal liability] in level annual payments" as if the first payment (here $52,000) were due on the first day of the year following the withdrawal (here January 1, 1995). 29 U.S.C. § 1399(c)(1)(A)(i). This amortization schedule is "based on the assumptions used for the most recent actuarial valuation for the plan." 29 U.S.C. § 1399(c)(1)(A)(ii). The assumption that applies to the calculation is the discount rate, which for Central States is 8%

A final detail is necessary to set up the problem. The first payment is actually due only after the plan issues a demand for payment. This may be earlier or later than January 1, 1995. (The January 1 date is actually only a hypothetical date for purposes of determining a schedule, which is then transferred to the date the first payment is actually demanded). At this point we have taken the process as far as we can with certainty. We do not know how to safely apply this discount rate in determining a payment schedule because the Third, Fourth and Seventh Circuits have each suggested a different method. There is no dispute that interest at the plan's discount rate (here of 8%) must be applied to the payment schedule. 29 U.S.C. §§ 1399(c)(1)(A)(ii) and 1399(c)(6). The dispute is over how to apply this discount rate to the period before the first payment is actually due. The differences among the circuits are as follows.

Third Circuit: Treat the discount rate as an interest rate applicable to the one-year gap between the UVB calculation date and the hypothetical first payment date. Thereafter interest accrues only from the date the actual first payment is due under the schedule of payments (the amortization schedule) demanded by the pension plan.

Fourth Circuit: Apply no interest to the period between the UVB calculation date and the date the actual first payment is due under the schedule of payments demanded by the pension plan. Thereafter interest accrues in accordance with this amortization schedule.

Seventh Circuit: Apply no interest to the period between the UVB calculation date and the date of withdrawal. Apply the interest rate to the period from the date of withdrawal to the date the actual first payment is due under the schedule of payments demanded by the pension plan. Thereafter interest accrues in accordance with this amortization schedule.

The essential difference is the beginning balance on the date the actual first payment is due. The following tables illustrate how the courts of appeals would calculate this balance differently using our example, including Central States' 8% discount rate. Assume that the plan issues its demand for payment in late 1995 with a schedule providing for the first actual payment on January 1, 1996, 18 months after the date of withdrawal.

HOW THE CIRCUITS WOULD CALCULATE THE BEGINNING BALANCE

	Third Circuit	Fourth Circuit	Seventh Circuit
Employer's share of UVB (12/31/93)	$180,000	$180,000	$180,000
Interest to hypothetical first payment on 1/1/95	14,400 [7]	0	7,200 [8]
Additional interest to actual first payment on 1/1/96	0	0	14,400
Beginning balance under payment schedule	194,400	180,000	201,600

From this point it is a simple matter of deducting payments and adding interest until the withdrawal liability is paid in full.

---

[7] 8% interest for one year only (gap year interest).

[8] 8% interest per year from date of withdrawal until payments commence (here, ½ year in 1994 and a full year in 1995).

PAYMENT SCHEDULE

	Third Circuit	Fourth Circuit	Seventh Circuit
Beginning Balance	$194,400	$180,000	$201,600
less 1/1/96 Payment	52,000	52,000	52,000
Balance Forward	142,400	128,000	149,600
plus 1/1/97 Interest	11,392	10,240	11,968
less 1/1/97 Payment	52,000	52,000	52,000
Balance Forward	101,792	86,240	109,568
plus 1/1/98 Interest	8,143	6,899	8,765
less 1/1/98 Payment	52,000	52,000	52,000
Balance Forward	57,935	41,139	66,333
plus 1/1/99 Interest	4,635	3,291	5,307
less 1/1/99 Payment	52,000	44,430	52,000
Balance Forward	10,570	0	19,640
plus 1/1/00 Interest	846	0	1,571
1/1/00 Payment	11,416	0	21,211
Balance Forward	0	0	0
TOTAL PAYMENTS	$219,416	$200,430	$229,211

II. SO-CALLED "FIRST-YEAR INTEREST" IS NOT REALLY INTEREST

As the above tables show, the differences among the circuits are found in their determination of the beginning balance to which the payment schedule will apply. There would be no problem if the UVB were calculated as of the date of withdrawal and the first payment were actually due on that date because there would be no gap. But since the UVB is calculated only once annually by the plan's actuary (as of December 31 of each year for Central States), it is not known precisely for withdrawals occurring on any other date. To calculate withdrawal liability, plans must either look back to the last valuation or forward to the next, and Congress has directed that they look back.

In drafting MPPAA Congress grappled with the disparity between dates of withdrawal and valuation dates.

First it considered having the plan wait until the first post-withdrawal valuation:

> (3) The amount of an employer's liability under this paragraph is the product of—
>
> > (A) the plan's unfunded benefit obligations as of the end of the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year. . . .

S.1076: Summary and Analysis of Consideration, Committee on Labor and Human Resources, United States Senate at p. 115 (Committee Print, April 1980) (Sec. 104 of the Bill adding a new section 4201(f)(3) to ERISA). In later drafts Congress altered the rule to its present form, requiring the plan to look back to the last valuation date before the date of withdrawal. 29 U.S.C. §§ 1399(c)(3) and 1399(c)(2)(C).[9]

As noted above the actuarial valuation of UVB involves a determination of present values of future assets and liabilities. To determine these present values, plan actuaries use assumptions that must be satisfactory to the Internal Revenue Service. 26 U.S.C. § 412(b)(5). In effect the actuary discounts these future values to an equivalent amount in today's dollars. But if the valuation date is before the employer's date of withdrawal, then the discount has gone too far and has produced a

[9] One of Congress' goals in this legislation was to maintain plan income (and thus solvency) by substituting withdrawal liability payments for the contributions the withdrawn employer had previously made. *See* S. 1076: Summary and Analysis, *supra*, at 20 ("the Committee has balanced the need to protect the plan from interruptions in the flow of contributions"). This could not be achieved without a potentially harmful gap in payments if the plan must wait until the end of the year to calculate withdrawal liability. The change allows for speedier assessment of liability.

value in last year's dollars. If an adjustment is not made, then the employer will pay too little in withdrawal liability to cover its share of the UVB.

The brief of the United States in support of the petition for certiorari made this point well.

> [I]f an employer withdraws from a plan only one year before the last unfunded benefit of $105 comes due, and if the assumed rate of interest under the plan is 5%, the present value of that unfunded liability one year earlier (as of the end of the plan year preceding withdrawal) would be $100. If interest, at the applicable plan rate, is not added back into the calculated deficiency *from the calculation date forward*, the amount paid by the employer a year later (at the presumed first payment date) would not "amortize" the deficiency. In this simple example, the payment required one year after the "calculation date" to make up the deficiency is $105 ($100 plus $5 interest), not $100.

Brief of United States as Amicus Curiae at 18-19 (emphasis in original). While the United States referred to the plan's "rate of interest" and supported adding back the interest to hold the plan whole, it was really dealing with the plan's discount rate. It is not strictly interest that must be added back; it is an adjustment to an excessive discount that must be made. By applying the plan's discount rate, the excess discount is reversed and the UVB calculation can be brought forward to a present value at an appropriate payment date.

The court below was concerned that interest not be applied to a period before the debt even accrued. *Schlitz*, 3 F.3d at 1004. It did not consider the point that the UVB actually had been discounted excessively. When seen as the discount adjustment that it actually is, the additional amount added to reflect time values is not the application of interest to an unaccrued debt that the Seventh Circuit feared and upon which it based its de-

cision. It is simply the final step in the calculation of the debt's beginning principal balance—the withdrawal liability.[10] Since the decision below rests solely on the court's erroneous view of the division between principal and interest, the decision must fall.

This attacks the Seventh Circuit's rationale for striking down "interest," but it does not address whether the language of the statute permits a present value refinement to the UVB in the first place. Since we have shown that the Seventh Circuit's rationale is wrong, we turn now to what the statute does require.

> [A]n employer shall pay [its share of the plan's UVB] over the period of years necessary to amortize the amount in level annual payments . . . calculated as if the first payment were made on the first day of the plan year following [the date of withdrawal]. Actual payment shall commence in accordance with paragraph (2).

29 U.S.C. § 1399(c)(1)(A)(i). In other words Congress specified that a hypothetical payment schedule be derived and then be transferred to an actual payment date. The question is why Congress specified that the hypothetical schedule begin on the first of the year following the withdrawal instead of the first day of the year of the withdrawal (thus coinciding with the valuation date). If Congress had specified the latter, there would be no gap, and it would be entirely clear that no further present value adjustment to the UVB should be made. By separating the hypothetical first payment from the valuation date "as if" the first payment were made on the later date, Congress instructs that an adjustment be made before the schedule is transferred to an actual first payment

[10] See also 29 U.S.C. § 1381(b)(1). Withdrawal liability is defined as the end result of a series of adjustments to the employer's UVB share, including adjustments to the payment schedule. This implies that development of the payment schedule is an interim step in the withdrawal liability calculation. The debt is not "withdrawal liability" until the final adjustment to the UVB is made to create the beginning balance under the schedule.

date. By using the term "amortize" and explaining it further in the next clause, Congress clarifies that the plan's discount rate be applied to make the adjustment. 29 U.S.C. § 1399(c)(1)(A)(ii).[11] Of course, reversing the excess discount is mathematically the same as applying one year of interest at the same rate, so it is understandable that courts and plans have treated it as interest; but in theory it is not.

In sum Congress intended this so-called "first year interest," but it is not really interest after all. Thus there is no undue (or retroactive) interest charge on an unaccrued debt as the Seventh Circuit feared. The court below should be reversed. The plan's payment schedule should be upheld in accordance with the ruling of the district court.

III. IF THE SEVENTH CIRCUIT IS AFFIRMED, INTEREST SHOULD ACCRUE FROM THE DATE OF WITHDRAWAL

The court below ruled that "[n]either the word 'amortize' . . . nor any other language of the statute supports an approach that calls for pre-withdrawal interest." *Schlitz*, 3 F.3d at 1004. "To the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the December 31 calculation date and the date of actual withdrawal, we disapprove that decision." *Id.* The word "amortize" does, however, mean to apply some interest.

> Amortize: to provide for the gradual extinguishment of (as a mortgage) usu. by contribution to a sinking fund at the time of each periodic interest payment.

[11] The lone numerical example contained in the legislative history of the statute applies a one-year charge to the first payment. H. Rep. No. 96-869, 96th Cong., 2d Sess. 83 (reprinted in 1980 U.S. Code CONG. & ADMIN. NEWS 2918, 2951).

Webster's New Collegiate Dictionary, G. & C. Merriam Company (1976). The Seventh Circuit recognized this in disapproviing only pre-withdrawal interest. "An assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct, would not be troubling." *Schlitz*, 3 F.3d at 1004.

The Fourth Circuit, by contrast, disapproved any interest accruing before the first payment date. *Borden*, 974 F.2d at 536 ("MPPAA is silent on the issue of imposing interest during the year in which the employer withdraws."). The Fourth Circuit did not even acknowledge Congress' use of the terms "amortize" (other than to quote the passage), much less analyze it.

As we show in Section II, *supra*, the "gap year" charge is not really interest but may be treated as such mathematically to achieve a proper present value of the UVB. Congress confirmed this with the word "amortize" used in conjunction with the deferred hypothetical first payment date. If this Court accepts, however, the Seventh Circuit's view that this charge is truly interest on a newly arisen debt, then it might reasonably conclude that no interest should apply to a period before the debt existed, as the Seventh Circuit held.[12] But then the Court should also accept the Seventh Circut view that by the term amortize Congress meant plans to apply interest to the debt, even to the gap year, as long as it applies only to the period after the debt arises (on the date of withdrawal). The Fourth Circuit did not address the statutory language, other than to erroneously state that the statute was silent; so its reasoning is flawed and its conclusion is wrong. Thus if the Seventh Circuit is affirmed at all, the Fourth

[12] The withdrawal liability debt is, of course, actually just a specific allocation of a more general UVB debt shared by all plan contributors; thus it is not an entirely new debt, and pre-withdrawal interest is appropriate. See brief of *amicus curiae* National Coordinating Committee for Multiemployer Plans.

Circuit should still be disapproved, and interest should be allowed to run from the date of withdrawal.

CONCLUSION

This Court should reverse the court below and order the reinstatement of the judgment of the district court (thus approving the Third Circuit's decision in *Casablanca* and disapproving the Fourth Circuit's decision in *Borden*). Alternatively this Court should affirm the court below that interest runs from the date of withdrawal (thus approving the Third Circuit's decision in *Casablanca*, in part, and disapproving the Fourth Circuit's decision in *Borden* in its entirety).

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING CO.
and THE STROH BREWERY CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE SUPPORTING PETITIONER

CONSENT OF PARTIES

This brief is being submitted with the consent of all parties pursuant to Rule 37.3 of the Rules of this Court. Letters of consent are being filed separately.

INTEREST OF AMICUS CURIAE

This brief is filed by the National Coordinating Committee for Multiemployer Plans ("NCCMP") as amicus curiae. It concerns a single issue—whether withdrawal liability payments under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") properly include "first year" interest, *i.e.*, interest for the year between the date as of which the employer's share of the plan's un-

funded liability is valued and the date withdrawal liability payments are deemed by the statute to begin.

The NCCMP believes that the statute requires the inclusion of first year interest—indeed, that nothing less will fulfill the statutory mandate that withdrawn employers pay their full share of the plan's unfunded vested benefits. It therefore agrees with the position of the Solicitor General and the Petitioner (as well as the Court of Appeals for the Third Circuit) and disagrees with the decisions of the Seventh and Fourth Circuits that MPPAA does not authorize the assessment of first year interest.[1]

The NCCMP is a nonprofit, tax-exempt organization established shortly after Congress enacted ERISA in 1974. Its affiliates consist of more than 240 multiemployer pension and welfare plans, or their sponsors. On behalf of its affiliated plans, and the approximately nine million participants and beneficiaries of multiemployer plans generally, the NCCMP is entirely engaged in monitoring the development—legislative, administrative and judicial—of the laws relating to the structuring and administration of multiemployer pension and welfare plans. The NCCMP

[1] *Compare Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S.Ct. 1070 (1993) (*"Huber"*) *with Jos. Schlitz Brewing Co.* v. *Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993) (*"Schlitz"*) and *Borden, Inc.* v. *Bakery & Confectionery Union & Industry Int'l Pension*, 974 F.2d 528 (4th Cir. 1992) (*"Borden"*). In addition to the conflict among the circuits, a number of arbitration decisions have reached a conclusion different from that of the decision below. *See Du Art & Technicolor* v. *Motion Picture Laboratory Technicians Local 702 Pension Fund*, 10 EBC 1317 (O'Loughlin Arb. 1987), *affirmed in part, remanded in part*, 10 EBC 1326 (S.D.N.Y. 1988); *Loomis Armored, Inc.* v. *Central States Pension Fund*, 8 EBC 1899 (Tilove Arb. 1987); *Seaboard Lumber Co. and Board of Trustees of the Western Council LPIW-Timber Operators Pension Trust Fund*, AAA No. 75-621-0001—86-MEPP (Byrholdt Arb. 1986); *Anchor Supply Co. and Western Pennsylvania Teamsters and Employers Pension Fund*, AAA No. 55-621-0010-85-MEPP (Hannan Arb. 1986) (all holding that pre-demand interest may be charged for at least a portion of the period before withdrawal)

has, on a number of occasions, participated as *amicus curiae* before this Court and various Courts of Appeal.

The question of first year interest is of considerable importance to multiemployer plans generally, a community for which the NCCMP is uniquely qualified to speak. The issue of how much interest to charge a withdrawing employer must be resolved by every multiemployer plan every time it assesses withdrawal liability. For the reasons set forth below, this Court should reverse the decision of the Court of Appeals and declare that first year interest must be included in assessing withdrawal liability.

SUMMARY OF ARGUMENT

The withdrawal liability of an employer who withdraws from a multiemployer pension plan must include an assessment for "first year" interest. MPPAA provides that a portion of the unfunded vested benefits ("UVB") of such a plan is allocated to each withdrawn employer, that the portion so allocated shall be "amortized" through withdrawal liability payments, and that the first withdrawal liability payment is deemed to be made on the first day of the plan year following the year of withdrawal—one year after the date as of which the withdrawn employer's share of the plan's UVB is valued. The requirement to "amortize" such UVB clearly establishes that interest must be paid thereon, and the only way to ascribe any meaning to the provision that deems the first payment to be made on the first day of the next plan year is to assess first year interest.

This interpretation of the statute is particularly appropriate since the assessment of first year interest is consistent with standard amortization practices in which the first periodic payment on a mortgage is made at the end of the first period and interest is assessed from the beginning of that period. The decision below would require a radical departure from standard amortization and actuarial practices, and there is no indication that Congress intended any such departure.

Moreover, the assessment of first year interest is necessary to ensure that withdrawing employers pay their full, pro rata shares of the plan's UVB. The present value of such vested benefits is, under the statute, calculated as of the last day of the plan year preceding the year of withdrawal, which, of course, is before the employer withdraws and begins making withdrawal liability payments. Since the present value of such benefits will, as a result of the time value of money, inevitably grow between the initial calculation and the time payment actually begins, the withdrawn employer would pay less than its full share if interest were not assessed.

ARGUMENT

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN REFUSING TO ASSESS "FIRST YEAR" INTEREST, I.E., INTEREST FROM THE DATE THE LIABILITIES ALLOCATED TO THE WITHDRAWN EMPLOYER ARE VALUED TO THE FIRST DAY OF THE PLAN YEAR FOLLOWING THE YEAR OF WITHDRAWAL.

Although the precise scope of its holding is somewhat unclear,[2] the Court of Appeals apparently held that Respondents were not required to pay interest from the "calculation date" of their withdrawal liability (the last day of the plan year preceding the plan year of withdrawal)[3] to the date the statute deems payment of such

[2] The Court of Appeals reversed the district court's decision "to the extent it requires Schlitz to pay interest for 1981," *Schlitz*, 3 F.2d at 1004, thereby seeming to indicate that no interest could be assessed for any part of the year of withdrawal. However, it also stated that "MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises," *id.*, thereby suggesting that interest might be properly assessed for the period following an employer's withdrawal.

[3] ERISA § 4211(b)(2)(A), 29 U.S.C. § 1391(b)(2)(A). (Section references herein are to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*)

liability to begin (the first day of the plan year following the plan year of withdrawal).[4] This amount, which is generally referred to as "first year interest," is assessed by most of the NCCMP's affiliates when making withdrawal liability calculations.

As discussed below, the assessment of first year interest is called for by standard actuarial and amortization practices, is required by the language of MPPAA, and is necessary to fulfill the purpose of MPPAA to require withdrawing employers to pay their full, pro rata shares of the plan's unfunded vested benefits.

A. The Assessment of First Year Interest Is Consistent With Standard Amortization Practices and Is Required by the Language of MPPAA.

The statutory imposition of withdrawal liability constitutes, in essence, an allocation to each withdrawn employer of a portion of the plan's underlying UVB. ERISA §§ 4201(b)(1), 4211. The UVB of a plan may usefully be thought of as a kind of mortgage, representing the extent to which future benefit obligations are not currently funded by the existing plan assets. This "mortgage" will eventually be paid off by the contributions of participating employers and the withdrawal liability payments of withdrawn employers. When a previously-participating employer withdraws, a portion of the UVB mortgage liability is assigned to the withdrawn employer. However, this mortgage's principal balance at any given time (and therefore the portion to be so assigned) can only be determined precisely through a complex and lengthy process called an actuarial valuation.

The statute defines UVB as an amount equal to "the value of nonforfeitable [*i.e.*, vested] benefits under the plan, less the value of the assets of the plan." ERISA § 4213(c). Valuing the plan's assets, particularly if they

[4] ERISA § 4219(c)(1)(A)(i), 29 U.S.C. § 1399(c)(1)(A)(i).

consist of cash, cash equivalents, and publicly traded stocks and bonds, is a relatively straightforward process. (Note, however, that this value will change, based, for example, on stock and bond market movement, and often will change in unpredictable fashion.)

Valuing the plan's benefit obligations is more complicated. First, one must identify such obligations. That means, for each participant in the plan, determining the amount and number of benefit payments to which such participant is entitled, and the times at which such payments will be made. For example, in a plan providing $25/month in retirement benefits for each year of service credited under the plan, participant John Doe might be age 45 with 20 years of service. He would thus already have earned a $500/month retirement benefit, commencing in 20 years when he reaches age 65. Utilizing mortality assumptions, one could then determine the age to which Mr. Doe is expected to live, say 83. One would then have identified the plan's obligation to Mr. Doe as $6,000 ($500/month x 12 months/year) in the year 2014, and $6,000/year for each succeeding year through 2032.

After identifying the plan's obligation to Mr. Doe, its value can then be determined by establishing, in effect, how much the plan would have to set aside today in order to pay the identified benefits as they came due. This is done by "discounting" the future benefit obligations to a "present value." For example, the $6,000 due Mr. Doe in 2014 would, if discounted at 7 percent for 20 years, have a present value of approximately $1,551. (Another way of looking at this is to say that $1,551 put aside today will grow, at 7 percent compound interest, to $6,000 in 20 years.) A similar calculation is then done for each of the other identified benefit payments for Mr. Doe, and for each of the payments due to each other plan participant and beneficiary. The sum of such present values for all vested benefits under the plan is "the value of nonforfeitable benefits under the plan."

A plan with cash or other assets equal to or greater than the value of its nonforfeitable benefits has no UVB *i.e.*, no "mortgage." Those assets, together with the expected earnings thereon, should be sufficient to pay all vested benefits as they come due. By contrast, a plan with total assets having a value less than the value of its nonforfeitable benefits does have UVB, and therefore has a "mortgage" that must be paid off.

Like any mortgage, the UVB of a plan, measured at any given point in time, accrues interest thereafter. If not paid down, a plan's UVB will grow as the time nears when plan benefits must be paid. In the year 2014, the $6,000 payable to Mr. Doe would have a present value of $6,000 rather than the value of $1,551 it had in 1994.

When an employer withdraws, as noted earlier, MPPAA in effect assigns that employer an allocated share of the plan's outstanding UVB "mortgage," measured as of the last valuation date, *i.e.*, the last day of the plan year preceding the year of such employer's withdrawal.[5] Just as the entire UVB mortgage accrues interest, so does this allocated share assigned to the withdrawn employer. A mortgage with a $10,000 outstanding balance, if separated into two mortgages, with $9,000 and $1,000 balances respectively, with the $1,000 piece assigned to a separate obligor, does not thereby cease accruing interest on that $1,000 piece, even for a period. And yet, as shown within, that is precisely the result reached by the Court of Appeals below.

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[5] If practical, it might well have made sense to calculate and assign this mortgage share on the date of withdrawal itself, when the employer's contributory relationship with the plan terminated. However, as shown above, calculating the mortgage balance precisely as of any given date is a complicated and expensive procedure. Congress instead mandated a simpler and more practical approach, calculating and allocating the outstanding mortgage balance as of a single day (the end of the preceding plan year) for all withdrawals within a given plan year.

The Court below also found it useful to view the liability of the withdrawn employer as a kind of loan, and, as a loan, to accrue interest from some point in time. *Schlitz*, 3 F.3d at 1004. However, the method prescribed by the Court of Appeals for repaying this "loan" is contrary to standard amortization practices, which require interest to accrue from the outset.

The most familiar amortization calculations, such as those used in the calculation of standard home mortgages, assume that the first payment occurs at the end of the first period and that interest begins to accrue from the beginning of the first period. *See Loomis Armored, Inc.* v. *Central States Pension Fund*, 8 EBC 1899, 1920-21 (Tilove Arb. 1987). For example, in the case of a ten-year second mortgage of $10,000 at 10 percent annual interest, each yearly payment would be $1627.45, the first payment would be due a year after the loan was made, and such payment would include interest for that year. The amount of the required amortization payment can be calculated with a simple financial calculator, or by using a standard amortization formula. We contend that the statute itself clearly prescribes exactly this kind of amortization calculation with respect to withdrawal liability.

The propriety of assessing first year interest turns on the interpretation of ERISA § 4219(c). That section describes in great detail how to establish an employer's withdrawal liability payment schedule over "the period of years necessary to amortize" the employer's allocated share of the plan's UVB. By using the term "amortize," the statute makes clear that interest—to account for the time value of money—must in some fashion be included in establishing the payment schedule. We submit that the language of Section 4219(c) clearly mandates the use of standard amortization practices, which require the assessment of first year interest.

As noted earlier, the principal amount of the UVB mortgage assigned to the withdrawn employer is determined as of the end of the year *preceding* the year of withdrawal, and the first payment is, under Section 4219(c), deemed to be made as of the beginning of the year *following* the year of withdrawal:

> [A]n employer shall pay the amount determined under [ERISA § 4211] . . . over the period of years necessary to amortize the amount in level annual payments . . . *calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs* and as if each subsequent payment were made on the first day of each subsequent plan year.[6]

In other words, for purposes of establishing the amortization schedule, the statute *deems* the first payment to occur at the end of the first period, and interest, pursuant to standard amortization practices, begins to accrue from the beginning of such period, *i.e.*, the date as of which the outstanding balance on the liability was calculated.

By contrast, what the Court of Appeals ordered here is not amortization, or is at least a very strange kind of amortization, where no interest accrues during the first period of the schedule. Under its approach, the first withdrawal liability payment, although occurring some time after the balance on the UVB mortgage was determined, would thus be pure principal, with no interest component, which anyone familiar with home mortgage interest (*e.g.*, for income tax deduction purposes) knows is exactly backward. In fact, the early payments of a mortgage are often mostly interest, because that is when the principal balance is the largest.

If interest did not accrue from the beginning of the first period, the standard amortization formula could not

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[6] ERISA § 4219(c)(1)(A)(i), 29 U.S.C. § 1399(c)(1)(A)(i) (emphasis added).

be used[7] and the full principal amount would not be amortized. In the second-mortgage example set forth above, it would instead be as though approximately $1500[8] were subtracted from the principal amount at the end of the first year, with only the remaining $8500 being amortized over the nine remaining years.

Nothing in MPPAA suggests that Congress intended such an unusual result. Rather, we submit that when Congress called for the withdrawn employer's liability to be "amortized" based on annual payments and deemed the first payment to be made a year after the date as of which the UVB to be amortized is valued, the conclusion is inescapable that Congress intended for interest to accrue during that year, just as it would in the amortization of a normal mortgage.[9]

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[7] The formula to calculate the amount of a periodic payment (assuming payment at the end of the period plus interest for the period) is

$$\text{prin} \times \text{int}/(1-(\text{int}+1)^{-n})$$

where prin = the principal amount, int = the interest rate per period, and n = the number of periodic payments. This formula is the one used to calculate the factors found in standard amortization tables.

[8] The ten annual payments would each be smaller, approximately $1500 rather than the $1627.45 alluded to above, because of the failure to accrue interest during the first period.

[9] The legislative history of MPPAA has an example of a withdrawal liability calculation, in which the numbers only work if first year interest is assumed:

> For example, assume that an employer's withdrawal liability is $1 million and that the plan's valuation rate of interest is 6 percent. Assume . . . [historic contribution rates that would, under ERISA § 4219(c)(1)(C), result in annual withdrawal liability payments of] $63,750. This would result in the amortization of the liability over approximately 49 years. Because the 49-year schedule is longer than 30 years, the employer would be liable to the plan for 30 annual payments of $63,750.

[Continued]

Indeed, assessing first year interest is the only way to give meaning to the statutory requirement, quoted above, that a withdrawn employer's payment schedule be calculated "as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs." Under the decision of the Court of Appeals, that portion of the statute has absolutely no function.[10] If no interest accrues prior to the first payment, calculation of the amortization schedule is in no way dependent on when such first payment is deemed to occur. An interpretation depriving this language of all function is contrary to the well established canon of statutory construction that statutes should be interpreted so as to give meaning to every part of the statute. *Mountain States Tel. & Tel.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Reiter* v. *Sonotone*, 442 U.S. 330, 339 (1979); Sutherland Stat. Const. § 46.06 (5th ed. 1992).

This Court should not countenance an interpretation that renders this pivotal phrase nugatory. Rather, interest should be assessed from the "calculation date" through the "deemed date" of payment consistent with standard amortization practices.

B. The Assessment of First Year Interest Is Necessary To Fulfill the Purpose of MPPAA.

Assessing first year interest is not only consistent with standard amortization practices, and necessary to give effect to the statutory language regarding the deemed date

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[9] [Continued]

H.R. Rep. No. 96-869, 96th Cong., 2d Sess. 83, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2951.

If no first year interest were included, the amortization schedule (apart from the 20 year cap mandated by ERISA § 4219(c)(1)(B)) would be 38 rather than 49 years. This fact is readily and simply verifiable with any financial calculator.

[10] By contrast, the decision of the Third Circuit in *Huber* recognized that the assessment of first year interest is necessary to give meaning to this portion of the statute. 916 F.2d at 97.

of payment, it is necessary to insure that the purpose of MPPAA—to require employers withdrawing from multiemployer plans to pay their full, pro rata share of the plan's UVB—is fulfilled.[11]

As noted earlier, UVB represents the difference, at a particular date, between the value of a plan's vested benefit obligations and the value of its assets. *See also Huber*, 916 F.2d at 95. Determining the value of the plan's vested benefits is a complex calculation requiring the plan to determine the future payment streams to which each participant will be entitled at retirement (making assumptions as to dates of retirement and mortality), and then discounting all of those payment streams back to a present value (using a suitable discount rate) as of the date for which UVB is to be calculated. The difference between the present value of those benefits and the value of the plan's assets at that date represents the plan's UVB. Thus, if an employer withdrew *on that date*, an *immediate* payment of its pro rata share of the UVB, without any further adjustments, would fund the eventual payment of the unfunded benefits allocated to it.

From a theoretical standpoint, it might well have been sensible for Congress to require a UVB determination on the date of each employer's withdrawal, so that such employer's share of the unfunding could be valued as of the exact moment the employer terminated its relationship with the plan.[12] (Because the value of plan assets and the

[11] The legislative history of MPPAA makes clear Congress' intent that withdrawing employers pay their full share of UVB:

> [E]mployer withdrawal liability is necessary to insure that employers that remain in the plan are not burdened with funding liabilities that should have been funded by the withdrawn employer.

126 Cong. Rec. S10,117 (1980).

[12] Even here, however, interest on the outstanding balance would properly be charged from the date of withdrawal (which would also be the date the employer's share of UVB was valued) through the date of final payment.

value of its benefit obligations change over time, UVB also changes over time.) In enacting MPPAA, however, Congress realized that this was not practical.[13] Instead, as discussed above, it provided that UVB would be calculated as of the last day of the plan year preceding the year of withdrawal, allowing plans to perform a single valuation at the end of each year.

While establishing a single calculation date eliminated the need to perform multiple valuations, simply using the plan's UVB as of that date, without any adjustment, would create another problem, namely the payment of too little withdrawal liability by any employer who withdrew after the calculation date, because the UVB used to calculate withdrawal liability would be too small. The underlying benefit obligations of the plan would have been discounted over too long a period—to a point before any payments (and therefore the earnings thereon) are received. As the Third Circuit recognized in *Huber*, a UVB calculation determines the amount necessary to fund the underlying benefits only if payment is received on the date of such calculations (or interest is charged to make up the difference):

> The unfunded vested benefits of the plan (*i.e.*, the present value of the vested benefits less that of the assets of the plan) are calculated as of the last day of the plan year preceding that in which the employer withdraws. *See* 29 U.S.C. § 1391. They represent the amount which, if contributed *on that day*, would fully fund the plan.
>
> * * * *
>
> In other words, the unfunded vested benefits calculation represents an employer's share of the amount

[13] The preparation of an actuarial valuation for a large plan with hundreds or even thousands of participating employers is a very complicated and expensive process which can take months. Many withdrawal dates may occur during a single year, with some large plans having experienced many hundreds of withdrawals during the 14 years that MPPAA has been law.

> needed for a fund to break even *as of the calculation date*. Due to the time value of money, that amount will grow between the calculation date and the withdrawal date.

916 F.2d at 95, 96 (emphasis in original).

In order to simplify the process, and to fix the actual number of payments without regard to when the plan actually demands payment, Congress explicitly deemed the first payment to occur on the first day of the plan year following the year of withdrawal.[14] Combined with the statutory requirement of level annual payments thereafter,[15] this established an ordinary annuity schedule, with the principal value determined at the end of the first plan year preceding withdrawal and annual payments deemed to be made, with interest, thereafter. First year interest is nothing more than the interest accruing on such liability during the first year of such annuity schedule.[16]

Both the Court of Appeals below and the Fourth Circuit's decision in *Borden* essentially ignored the growth in UVB due to the time value of money. Instead, they relied heavily on the simplistic contention that MPPAA, although a detailed statute, does not expressly refer to interest in this context, *i.e.*, before the plan issues a with-

[14] ERISA § 4219(c)(1)(A)(i), 29 U.S.C. § 1399(c)(1)(A)(i).

[15] *Id.*

[16] Of course, some employers will begin paying their withdrawal liability before the "deemed date of payment," while others will begin payment after it. While this may result in some employers (*i.e.*, those who pay early) paying more than their share of the interest necessary to fund the UVB fully, while later payers will pay less than necessary, these sorts of trade-offs are inevitable when Congress fixes a single date for making the calculation. It obviously determined that the payment by all withdrawn employers of one year of interest would be sufficient to solve the problem created by the fact that payment will be made after the calculation date. As the Third Circuit recognized in *Huber*, because of the practical considerations involved, "Congress was interested in rough equity, not precision." 916 F.2d at 99.

drawal liability demand.[17] Neither, however, does the statute expressly refer to interest *after* withdrawal liability is demanded. Yet no one, certainly none of the parties below, contends that the withdrawal liability payment schedule established by the statute must ignore interest altogether. Any such contention would clearly fly in the face of the statute.[18] Section 4219(c)(1)(A)(i) requires an employer to pay for its share of UVB over the period of years "necessary to amortize" such share. The concept of interest is intrinsic in the common, everyday meaning of the word "amortize."[19]

Moreover, the concept of interest is intrinsic to the calculation of UVB, which is itself the starting point for withdrawal liability calculations. As discussed above, one essential step in calculating UVB is determining the present value of the plan's future benefit payments. This requires the use of a discount rate to determine the amount of money that, if paid to the plan at the calculation date, would be sufficient to fund those benefits. In effect, the discount rate is the functional equivalent of interest. A discount rate converts the future value of benefit payments into a present value, and interest converts a present value into the future value of benefit payments.

Discounting the value of plan benefits back to a single valuation date—which in every case will be prior to the date of withdrawal, and prior to the date any withdrawal

[17] *See Schlitz*, 3 F.3d at 1004; *Borden*, 974 F.2d at 536. As noted above, however, this argument simply reads out of the statute the requirement that withdrawal liability shall be "calculated as if the first payment were made on the first day of the plan year following the plan year in which withdrawal occurs."

[18] *See e.g.*, ERISA §§ 4219(c)(1)(A)(ii) and 4219(c)(6), which set forth the interest rate to be used in establishing the withdrawn employer's payment schedule.

[19] For example, Black's Law Dictionary defines "amortization" as "[a] reduction in a debt or fund by periodic payments covering interest and a part of principal." Black's Law Dictionary, 83 (6th ed. 1990).

liability payments are made—avoids the need to perform a new valuation every time an employer withdraws. Nonetheless, for the reasons discussed above, it effectively discounts the value of those benefits too far back in time, to a date when no payment has been set aside on which earnings can be assumed. The "charging" of first year interest, taking the discounted amount back to the deemed date of payment, is thus really nothing more than a simple way of trying to calculate UVB as of the appropriate time without the need to conduct as many as 365 full scale actuarial valuations of the plan each year.

C. The Statute Provides No Basis for Suspending Interest from the Time UVB Is Determined Until Date of Withdrawal.

Although the Court below declined to assess interest from the calculation date, it indicated that an assessment of interest beginning on the date of withdrawal might be appropriate, supposedly because that is the date the withdrawn employer's liability arises.[20] *Schlitz*, 3 F.3d at 1004. However, this date is not so specified, or even referred to, in ERISA § 4219(c)(1)(A)(i). It is not in fact the date the underlying plan liability (as opposed to the obligation to pay withdrawal liability) arises, and it is not the correct date to use from an economic standpoint under the framework of the statute.

Under MPPAA the date of withdrawal (apart from establishing the plan year in which withdrawal occurs) is not relevant to establishing the withdrawal liability pay-

[20] In this regard, we note that the decision below disagreed with the decision of the Third Circuit in *Huber* to the extent it held that interest could be assessed for the period between the calculation date and the date of withdrawal, although it observed that "[w]hether *Huber* actually holds such a thing is doubtful." *Schlitz*, 3 F.3d at 1004. This comment is mystifying. The Third Circuit was absolutely clear in *Huber* that a full year's interest must be assessed. *See Huber*, 916 F.2d at 95 ("The Language of the Statute clearly compels the imposition of First Year Interest. . . .").

ment schedule. The statute does not value or allocate unfunded vested benefits as of such date. Rather, as discussed above, the logical date from which interest should accrue is the date as of which the UVB to be allocated to the withdrawn employer has been measured.

The discussion by the Court of Appeals regarding the possibility of assessing interest from the date of withdrawal demonstrates that that Court fundamentally misapprehended the obligation of employers to fund the UVB of multiemployer plans. In concluding that interest should not be assessed from the calculation date, the Court stated that "MPPAA does not imply that withdrawing employees *owe* anything as of the end of the year before they drop out" and that the withdrawn employer "was not liable for a penny until it withdrew from the Plan and received a notice of liability." *Schlitz*, 3 F.3d at 1004 (emphasis in original). These statements are not correct. The fact is that employers *do* have a liability for the plan's UVB before they withdraw.

Under the minimum funding requirements of ERISA, employer contributions must be sufficient (1) to pay for currently accruing benefits, and (2) to fund, over time, the plan's UVB.[21] Thus, even before withdrawing, an employer is liable, and must make payments, for its share of the plan's UVB.[22] The Third Circuit recognized this fact in *Huber*:

[21] *See* ERISA § 302, 29 U.S.C. § 1082. The statute provides that the plan's unfunded past service liability must generally be amortized over thirty years.

[22] One might argue that contributions made during part of the year of withdrawal (*i.e.*, prior to the withdrawal date) somehow cancel or otherwise offset the time-value growth in the employer's share of UVB. In some cases, such a theoretical offset of the interest accrual may actually occur. However, contributions (which tend to reduce UVB) are only one factor to be taken into account. For example, the service on which the employer contributes during the year of withdrawal may earn additional benefits for

[Continued]

> [W]hile the liability for unfunded vested benefits became accelerated on the date the employer withdrew, it did not magically appear on that date. . . . "[T]he liability for UVBs represents a pre-existing obligation on the employer's part, and is not simply 'incurred' as of the date of withdrawal."

916 F.2d at 96 (citation omitted).

Thus, contrary to the suggestion of the Court of Appeals below, there is no reason to assess interest beginning with the date of withdrawal. Rather, since the employer's obligation to pay off its share of the plan's UVB has existed all along, interest should be assessed beginning on the date as of which the obligation was calculated. Such an approach is not only mandated by the statute, it matches economic reality and comports with common borrowing experience, where a liability is determined as of a particular time and bears interest on the outstanding principal balance from that point until the time paid.

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[22] [Continued]
its workers, thereby tending to *increase* UVB. A similar result would obtain from a decrease in the market value of plan assets or unfavorable actuarial experience (*e.g.*, retirees living longer than expected). Whether the net of these factors is a plus or a minus cannot accurately be determined without an actuarial valuation. As noted above, Congress rejected this approach in favor of the more practical, and easily administrable, single annual valuation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit with respect to the issue of first year interest should be reversed.

Respectfully submitted,

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